TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 567.

WILLIAM H. ELLIS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED JANUARY 16, 1907.

(20,532.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 10, 1907.

a District Court of the United States, District of Massachusetts.

No. 444.

THE UNITED STATES BY INDICTMENT
versus
WILLIAM H. ELLIS.

Writ of Error.

Boyd B. Jones, Attorney, Exchange Building, Boston, Mass. for Plaintiff in Error.
Asa P. French, United States Attorney, for Defendant in Error.

b UNITED STATES OF AMERICA, *ss:*

[Seal of the District Court, Massachusetts.]

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Massachusetts, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, in a cause entitled United States by Indictment, *versus* William H. Ellis Defendant, Number 444 a manifest error hath happened, to the great damage of the said Defendant as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the third Monday of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable Melville W. Fuller Chief Justice of the United States, the twenty second day of December in the year of our Lord one thousand nine hundred and six.

FRANK H. MASON,
Clerk of the District Court of the United States,
District of Massachusetts.

Allowed by
FREDERIC DODGE,
U. S. District Judge.

c District Court of the United States, District of Massachusetts, ss:

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the said District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I Frank H. Mason Clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said Court this tenth day of January A. D. 1907.

[Seal of the District Court, Massachusetts.]

FRANK H. MASON, *Clerk.*

1 UNITED STATES OF AMERICA, *Massachusetts District, ss:*

At a District Court of the United States begun and holden at Boston, within and for the District of Massachusetts on the first Tuesday (being the fourth day) of December in the year of our Lord one thousand nine hundred and six.

Before the Honorable Frederic Dodge, Judge.

THE UNITED STATES OF AMERICA BY INDICTMENT
versus
WILLIAM H. ELLIS.

The Jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that William H. Ellis of Boston in said District, at said Boston, on the thirteenth day of June in the year of our Lord one thousand nine hundred and six, the said Ellis being then and there a contractor whose duty it was to employ the services of certain mechanics upon one of the public works of the United States, to wit, upon the construction of a certain pile and timber pier known as "Pier No. 2" at the United States Navy Yard at said Boston, did as such contractor as aforesaid then and there intentionally require and permit a certain mechanic, to wit, Amable De Gaust, to work, and said De Gaust did work, on said public work for more than eight hours on a certain calendar day, to wit, on said thirteenth day of June, there being then and there no extraordinary emergency requiring the employment of said De Gaust on said public work for more than eight hours on said day: against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

2 And the Jurors aforesaid for the United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that William H. Ellis of Boston in said

District, at said Boston, on the thirteenth day of June in the year of our Lord one thousand nine hundred and six, the said Ellis being then and there a contractor whose duty it was to employ the services of certain mechanics upon one of the public works of the United States, to wit, upon the construction of a certain pile and timber pier known as "Pier No. 2" at the United States Navy Yard at said Boston, did as such contractor as aforesaid then and there intentionally require and permit a certain mechanic, to wit, Solomon Moore, to work, and said Moore did work, on said public work for more than eight hours on a certain calendar day, to wit, on said thirteenth day of June, there being then and there no extraordinary emergency requiring the employment of said Moore on said public work for more than eight hours on said day: against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the Jurors aforesaid for the United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that William H. Ellis of Boston in said District at said Boston, on the thirteenth day of June in the year of our Lord one thousand nine hundred and six, the said Ellis being then and there a contractor whose duty it was to employ the services of certain mechanics upon one of the public works of the United States, to wit, upon the construction of a certain pile and timber pier known as "Pier No. 2" at the United States Navy Yard at said Boston, did as such contractor as aforesaid then and there intentionally require and permit a certain mechanic, to wit, James Harris, to work, and said Harris did work, on said public work for more than eight hours on a certain calendar day, to wit, on said thirteenth day of June, there being then and there no extraordinary emergency requiring the employment of said Harris on said public work for more than eight hours on said day: against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the Jurors aforesaid for the United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that William H. Ellis of Boston in said District, at said Boston, on the thirteenth day of June in the year of our Lord one thousand nine hundred and six, the said Ellis being then and there a contractor whose duty it was to employ the services of certain mechanics upon one of the public works of the United States, to wit, upon the construction of a certain pile and timber pier known as "Pier No. 2" at the United States Navy Yard at said Boston, did as such contractor as aforesaid then and there intentionally require and permit a certain mechanic, to wit, William McDonald, to work, and said McDonald did work, on said public work for more than eight hours on a certain calendar day, to wit, on said thirteenth day of June, *then* being then and there no extraordinary emergency requiring the employment of said McDonald on said public work for more than eight hours on said day: against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

This Indictment was found at the September Term, A. D. 1906 of this Court. And now on the fourteenth day of September, nineteen hundred and six, the said Defendant was set to the bar, and had said Indictment read to him, and for plea he said that thereof he was not guilty, and for trial put himself upon the country.

On the sixteenth day of October, nineteen hundred and six, the United States Attorney for this District came and said "I will no further prosecute the third (3d) and fourth (4th) counts of this Indictment."

4 Thereupon, on said sixteenth day of October, nineteen hundred and six, a jury was duly impanelled and sworn to try the issue, videlicet; Bertram Lord, foreman, and fellows, videlicet; Thomas F. Morris, Charles M. Parker, John E. Perkins, A. Myron Ramsdell, Cyrus Ricker, Albert H. Stone, Thomas Stothart, Albert H. Chaffee, John E. Gleason, Frederick T. West, and William H. H. Bryant.

On the eighteenth day of October, nineteen hundred and six, this cause was committed to the jury who after hearing all matters and things concerning the same, returned their verdict therein, and upon oath said, that of the first two counts of said Indictment the said Defendant was guilty.

From said September Term, nineteen hundred and six, this Indictment was continued to this present December Term, when on the twenty-second day of December, nineteen hundred and six, the following Bill of Exceptions is filed in open Court, and allowed, Defendant being present.

Defendant's Bill of Exceptions.

At the September term of the District Court of the United States for the District of Massachusetts, sitting at Boston within said District, the grand jury returned an indictment in four counts against said William H. Ellis charging violations of the Act of August 1, 1892, chap. 352, (27 Stat. L. 340), limiting the employment of mechanics upon any of the public works of the United States to eight hours in any one calendar day, except in case of extraordinary emergency.

The United States Attorney, with the consent of the Defendant, nol-prossed the third and fourth counts.

The first count charged in appropriate terms the employment of a mechanic therein named upon the construction of a public work known as Pier No. 2 at the United States Navy Yard at said Boston, on the thirteenth day of June, 1906, in violation of said act.

The second count differed from the first count only in the name of the mechanic.

5 On the fourteenth day of September, 1906, the Defendant pleaded not guilty to the entire indictment. Trial was begun on the sixteenth day of October, 1906, and finished on the eighteenth day of the same month. The verdict of the jury was guilty on both counts.

It was admitted that the pier in question was authorized by the Act of March 3, 1905, the appropriation therefor being expressed in the following language: "Navy Yard, Boston, Massachusetts. Approach to Dry Dock No. 1, $43,100."

The Defendant did not require proof of the fact that he was a contractor within the meaning of the Act of August 1, 1892, or that the construction of pier No. 2 was a public work as charged in the indictment, or that the mechanics named in said counts were permitted to work on said public work for more than eight hours each on said thirteennth day of June, 1906, with his knowledge and approval.

The United States introduced in evidence the contract dated October 13, 1905 between the United States and the Defendant for the construction of the pier in question.

This contract provides:

"First. That the said party of the first part will provide, furnish, and deliver, at his own risk and expense, at the United States Navy Yard, Boston, Massachusetts, all the necessary materials, labor, tools, and appliances for the construction and completion in all respects, of a pile and timber pier to be known as Pier No. 2, at said Navy Yard, and will construct and complete the same and do the required dredging within six calendar months from the date of this contract, in strict accordance with, and subject to, all the conditions and requirements of the plans and specifications appended hereto and forming a part hereof, for the sum of thirty-six thousand four hundred and seventy five dollars ($36,475.), plus thirty cents (30 cents) per cubic yard of material dredged."

General provisions 5, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 36 of the specifications are as follows:

"5. *Control of work.*—The United States, by its officer in charge of the work or other authorized representative, shall at all times have full control and direction of all work under the contract, and all questions, disputes, or differences as to any part or detail thereof shall be decided by such officer or representative, subject only to appeal to the Chief of the Bureau of Yards and Docks."

"7. *Employees.*—The contractor shall employ only competent, careful, orderly persons upon the work, and if, at any time, it shall appear to the officer in charge that any person employed upon the work is incompetent, careless, reckless, or disorderly, or disobeys or evades orders or instructions, or shirks his duty, such person shall be immediately discharged from and not again employed upon the work. No person undergoing sentence of imprisonment at hard labor shall be employed on the work to be done under this contract."

6

"8. *Time of commencement of work.*—The contractor shall commence work immediately after the execution of the contract and continue without interruption, unless otherwise directed by the United States by its officer in charge of the work or other authorized representative, or otherwise hereinafter provided."

"9. *Time of completion.*—The entire work shall be completed in

every respect and particular within six calendar months from the date of the contract."

"10. *Extension of time.*—Extensions of time for the completion of the work may be allowed and made, in writing, by the Chief of the Bureau of Yards and Docks. Any and every extension of time must be specifically made and shall not be implied from any cause under any circumstances."

"11. *Continuance of work after time.*—It is mutually understood and agreed that in the event of the work not being completed within the time allowed by this contract, said work shall continue and be carried on according to all the provisions of said contract, plans, and specification, unless otherwise at any time directed by the party of the second part, in writing, and said contract shall be and remain in full force and effect during the continuance and until the completion of said work, unless sooner revoked or annulled according to its terms: *Provided,* That neither an extension of the time beyond the date fixed for the completion of said work nor the permitting or accepting of any part of the work after said date shall be deemed to be a waiver by the party of the second part of its right to annul or terminate said contract for abandonment or failure to complete within the time specified in paragraph 9, or to impose and deduct damages as hereinafter provided."

"12. *Damages for delay.*—In case the work is not completed within the time specified in paragraph 9, or the time allowed by the Chief of the Bureau of Yards and Docks under paragraph 10 of this specification, it is distinctly understood and agreed that deductions at the rate of $10 per day shall be made from the contract price as liquidated damages, and not as penalty, for each and every calendar day after and exclusive of the date within which completion was required, up to and including the date of completion and acceptance of the work, said sum being specifically agreed upon in advance as the measure of damages to the United States by reason of delay in the completion of the work; and the contractor agrees and consents that the contract price, reduced by the aggregate of damages so deducted, shall be accepted in full satisfaction for all work done under the contract."

"13. *Unavoidable delays.*—Unavoidable delays are such as result from causes which are undoubtedly, or may reasonably be presumed to be, beyond the control of the contractor, such as acts of Providence, unusual storms, fires (not the result of negligence) fortuitous events, inevitable accidents, etc. Delays caused by acts of the United States will also be regarded as unavoidable delays. Should the progress of the work be, or seem likely to be, delayed at any time by such causes, the contractor shall at once notify the officer in charge, in writing, of the occurrence, in order that a record of the same may be made. Should it be decided that the delay was unavoidable, a corresponding extension of time for the completion of the work may be allowed, but it is distinctly understood that should the contractor fail or neglect to notify the officer in charge as above provided, such omission shall be construed as a waiver of all claim and right to an

extension of time for the completion of the work on account of such delay."

7 "14. *Avoidable delays.*—Avoidable delays are such as result from causes which the contractor might, by care, prudence, or foresight, have guarded against or prevented. No extension of time will be allowed on account of such delays.

"15. *Progress of work.*—If at any time the progress of the work shall, in the opinion of the officer in charge, appear to have been such as to indicate that the work is not likely to be completed within the time allowed, he shall report such opinion to the Chief of the Bureau of Yards and Docks, who may, in his discretion, declare the contract null and void, without prejudice to the right of the United States to recover for defaults therein or violations thereof."

"36. *Piles.*—All piles, excepts as mentioned below, shall be sound, straight, long-leaf yellow pine, not less than 8 inches in diameter at the point and 12 inches in diameter at a point 5 feet from the butt. All yellow-pine piles shall be creosoted with at least 16 pounds of creosote per cubic foot of pile. All bollards and fender piles, all end-bearing piles in each bent, all brace piles, and all piles in the off-shore end bent and in each outer corner shall be of white oak, sizes as specified for yellow-pine piles. Sizes specified above are for piles exclusive of bark. Piles shall be sufficiently straight so that a line joining the center of each end shall fall entirely within the pile."

The construction of the pier required 311 pine piles and 366 white oak piles. The pier in question was completed in the week ending October 13, 1906. It is a little more than 500 feet long and about 50 feet wide. The contract called for the demolition of an old wharf which extended out about 200 feet and occupied a portion of the space occupied by pier No. 2. Pier No. 2 is an approach to dry dock No. 1, and is to the right of a vessel approaching that dock. To the left of the approach to dry dock No. 1 is pier No. 1, which was finished about three years ago. Dry dock No. 1 was completed in 1835 and has been in use from then until the present time. There is another and larger dry dock at the same Navy Yard, which was completed last year.

FRED THOMPSON, a witness called by the United States, testified as follows:—

I am a civil engineer in the navy, and have been connected with the Boston Navy Yard fifteen months. I have charge of all works of construction outside of repairs to ships, including the charge of construction and improvements of wharves, quays, piers, streets, water works, electric lighting, etc. in the Navy Yard. Before I came to Boston, I was six years in the Norfolk Navy Yard and eight months at the New York Navy Yard. The construc-

8 tion of pier No. 2 was under my charge, and I looked over the work while it was going on once or twice a day.

In reply to questions propounded by the United States Attorney the witness testified as follows:

Q. That pier has been referred to and styled in the specifications

and in the Act making the appropriation as an approach to dry dock No. 1. Will you state what is meant by an approach to a dry dock?

A. Well, it is the custom in the N-vy Yards of this country to have wharves or piers on each side of the entrance to a dry dock extending out 150 or 200 feet, or may be more, which are for the purpose of warping ships so that they can be easily docked.

Q. I have not come to that yet. These (indicating on plan) are what are called approaches?

A. Yes.

Q. Dry docks are sometimes built without approaches?

A. Yes.

Q. Sometimes with a single approach?

A. Yes.

Q. And sometimes with a double approach; is that true?

A. Sometimes without any——

Mr. JONES: That refers to the present time?

Mr. FRENCH: Yes, to the present time.

The WITNESS: I can't answer that exactly, because there are dry docks building now in this country in the Navy Yards which have no approaches at all.

* * * * * * *

Q. Now will you describe how this pier, or such a pier, is used in docking vessels?

A. The ship is brought towards the entrance of the dock, for instance, at a convenient time, and moored up along-side of this wharf, and then when the tidal conditions are proper the caisson is taken out, the dock is flooded and the ship is put into the dock and her lines are handled from the approaches on each side of the dock, and she is pointed in through the moorings on both sides of the entrance. That is the use of the wharf for docking ships.

Q. How long do you say you were at the Navy Yard at Boston before this pier was constructed?

A. Well, the pier has only been finished this last week. I have been here 15 months.

Q. During that time have vessels been docked in dry dock No. 1?

9 A. Yes.

Q. How many should you say—about how many?

A. Oh, I should say fifty.

Q. Have they been so docked with safety?

Mr. JONES: One moment. If he means by that without injury to the vessel, I do not object.

Mr. FRENCH: Without injury.

A. So far as I know there have been no injuries.

Q. Can vessels be docked without any approach to the dry docks?

A. Yes.

Q. Can they be docked without injury?

A. Yes.

Q. What can be done by reason of the existence of this pier,—

Pier No. 2,—that could not have been done before with respect to the docking of vessels?

A. Nothing.

Q. What then is the purpose of the pier? How does it help, if at all?

A. The pier serves as additional wharfage facilities in the Yard for furnishing ships with supplies, and at the same time it makes the docking of ships in the dock safer, probably more economical and at a less expense to the Government than otherwise.

Q. That is to say, it facilitates the docking of the vessel?

A. It facilitates the docking of the ship.

Mr. JONES: Makes it safer is what he said, Mr. French.

Q. It makes it safer?

A. Yes, safer.

Q. And cheaper?

A. I think so.

Q. And it can be done somewhat more rapidly?

A. I think so.

On cross examination the witness testified as follows:—

(By Mr. JONES:)

Q. Mr. Thompson, perhaps I did not get your official title in the Navy Yard?

A. Civil Engineer.

Q. And as civil engineer it was your duty to see that the terms of this particular contract were complied with?

A. Yes, as far as contained in the contract and specifications.

Q. That is all I meant. I wanted to bring that fact out.

A. Yes.

Q. And for that reason from time to time, and from day to day, you saw this work going on?

A. Yes.

Q. So that you were familiar with the work itself, and with the progress of the work?

A. Yes, sir.

Q. And in a general way knew the conditions of the work, knew that men were being employed on the work, and knew that they were being employed more than 8 hours in each calendar day?

A. Yes.

Q. And then at some time, and I think brother French has given us the date of July 30th, there was some disturbance arising from the fact that Mr. Ellis was letting men work there 9 hours a day. You were aware of that, were you?

A. Yes.

Q. But until July 30th, or just about that time, so far as you knew there was no complaint or disturbance arising from the fact that he did let men work there more than 8 hours a day?

* * * * * * *

A. There had been no complaints at all.

Q. If you smash a vessel or hurt her and can't get at her in the water, you take her into the dry dock and let the water out and get at the vessel for repairs?

A. Yes.

Q. And I take it these dry docks were used for the purpose of repairing the United States vessels?

A. Yes.

Q. Now, in getting a vessel into Dry Dock No. 1, by means of those approaches, you would use warps,—you would warp her in, would you?

A. Yes.

Q. And by warping in do you mean that great ropes would be attached to the sides of the vessel and passed around belaying pins on the approaches, and that men would pull on those ropes and move the vessel along steadily, smoothly and evenly into the Dry Dock No. 1?

A. Yes.

Q. And it was important that that vessel should be guided into that Dry Dock No. 1 in an easy, direct manner, without its colliding with any structure or the shore—that it should enter it directly—was it not?

A. Yes.

Q. Now, these piers on either side, when completed, have a smooth surface?

A. Yes.

Q. And they are at an elevation above the water, which is fixed by the terms of the contract?

A. Yes.

Q. And in fixing that elevation you have in reference the uses to which the pier is to be applied?

A. Yes.

11 Q. Now, in pulling one of those vessels—I say "pulling"—I presume you would say "docking" it—but you know what I mean—in pulling one of those vessels into that dock, there is less liability if you have an approach at a proper elevation and approved surface, and a smooth surface, than if you have an inconvenient elevation and a rough surface?

A. Yes, certainly.

Q. These dry docks are for the purpose of repairing the United States vessels?

A. Private vessels have been docked in there, but only in cases where its use is not necessary for Government vessels.

Q. I mean that the primary purpose——

A. The primary purpose is for the United States use, of course.

Q. And if two vessels, war vessels, of the North Atlantic Squadron do you have such a squadron?

A. Yes.

Q. — should collide with each other, and each of them should be damaged and need repairing, that would be one of the purposes for which these dry docks would be applied?

A. Yes.

Q. And is it a fact that, in a naval sense, this Navy Yard is the home of the North Atlantic Squadron, the place at which it would naturally put up for repairs?

A. I think so, yes, naturally, Boston and Portsmouth, Boston preferably.

Mr. JONES: I suppose if they happened to be out in New York Harbor, and ran into each other off Hell Gate, they wouldn't bring them on to Boston, but would put into the Navy Yard nearby.

Q. That is so, is it?

A. They took the squadron from off Provincetown last week, or last month, and sent them down to New York or Norfolk.

(By Mr. FRENCH:)

Q. For repairs?

A. Yes. It was pretty much rush work here.

On cross examination also this witness described the method and manner of constructing the pier.

The witness further testified in cross examination.

Q. Now, then, during the progress of this work, Mr. Thompson, was it pushed as vigorously and expeditiously as it could have been to a completion?

12 The WITNESS: I should say that the work was pushed to completion as soon as could be. They used every effort to complete the work as rapidly as possible.

Q. Including working over time?

A. Including working over time.

On re-direct examination the witness testified as follows:—

(By Mr. FRENCH:)

Q. Now you have said on cross examination that there was greater safety in the docking of United States vessels by reason of the construction of this pier than there would have been without it. Did you mean safety to human life or limb, or safety to the vessel?

A. I should say safety to the vessel.

Q. But I supposed when you said it was safer you meant to use the term relatively? In other words, you have already said, I think, that vessels could be docked with safety in the exercise of proper care without the approach; that is true, isn't it?

A. Yes.

Q. Was it requisite or necessary for the *d*afety of the vessels that this pier, or one like it, should be constructed. The answer to that *i*t "yes" or "no." Was it essential to the safety of vessels that this pier should be constructed or not?

A. I will say no, it was not essential.

Q. Will you go any farther than to say that it was desirable?

A. I should say it was desirable, desirable to have this pier constructed for the safe docking of ships.

On re-cross examination the witness testified as follows:—

Q. Now, from the standpoint of a man of prudence, having in

mind, Mr. Thompson, the nature and value of the vessel to be docked, having in mind the amount of damage or pecuniary loss which may result from an injury to the vessel in docking, having in mind the possible needs of repairing vessels quickly as occasion for repair may require, was the approach in question, Pier No. 2, or some equivalent provision for docking vessels, reasonable necessary for their safe and speedy docking? Did you catch my question?

A. Yes. I should say that the construction of the pier was reasonably necessary for the safe docking of ships, the safe and economical docking of ships.

On re-direct examination the witness further testified:—

13 "Do you mean by that Mr. Thompson, it would require fewer precautions in docking of a ship with this pier than without it, in order to insure safety?"

Q. Is that substantially what you mean?

A. I do not think we would take any fewer precautions at all. We would have to take all the necessary precautions possible in any case.

Q. Perhaps you do not understand my question. You have already testified that you can dock ships safely without any approaches at all, haven't you?

A. They can be docked, yes.

Q. Safely without approaches?

A. Yes.

Q. You have stated, in substance—if you have not you will correct me—that ships could be docked in safety by using sufficient precautions without this pier—that you said?

A. Yes.

Q. You have already expressed an opinion that the construction of this pier, or one like it, was not requisite to the safe docking of ships; you have also, in response to a question of Mr. Jones, said that the construction of the pier was, in your opinion, reasonably necessary for the safe docking of ships?

A. Yes.

Q. I ask what distinction you make, what difference you suppose the question to include to which you answered it was not requisite or necessary, and to which you answered that it was reasonably necessary for the safe docking of a ship? What do you mean by "reasonably necessary"?

A. I mean that ships have been docked there since 1836 without this pier.

Q. And docked safely?

A. Yes. Now that this pier is constructed it adds a great deal to the safety of the docking.

Q. By "safety" do you mean facility?

A. Facility of docking, and safety of the ship. I should consider that the construction of the pier was a reasonable necessity, but not an absolute necessity; but it was a reasonable necessity

Q. Can you dock a ship more rapidly by reason of this pier?

A. I think so.

Q. And more easily?
A. Yes.
Q. More economically?
A. Yes.
Q. And with less risk to the vessel?
A. Yes, I think so.
Q. And when you have said that you have said all that
14 is to be said with regard to it, haven't you, practically?
A. I think so.

On re-cross examination the witness testified as follows:

(By Mr. JONES:)

Q. And so, so far as safety is concerned, the approach is reasonable necessary, but not absolutely necessary, as you have already told brother French.

A. I would rather put it in the way that it was desirable. A thing is really necessary I suppose if it is necessary. It is desirable; it is desirable to have that pier there for docking ships.

Q. Very desirable?
A. Very desirable.
Q. For the safe docking of ships?
A. Yes.
Q. And very desirable because it lessens the danger of a great loss and damage to the ships?
A. Yes.

SETH PERKINS, a witness called by the Defendant, testified as follows:

I have been a civil engineer and contractor for 30 years; have had experience on work similar to pier No. 2. In 1906 I was associated in business with the Defendant, and the construction of pier No. 2 was under my particular supervision. The Defendant knew that the men were employed on that work more than 8 hours on June 13, 1906. On that day I was pushing the work to completion in all ways as rapidly as I could, including overtime working. The Defendant was then employing on the construction of the pier all the men that could be worked there to advantage, and was doing everything that could be done to complete it as rapidly as possible.

Q. Could you have proceeded with equal advantage and with equal rapidity in the construction of the work if you had employed more men 8 hours than you were then employing 9 hours?

A. No sir; we could not put any more men on to do the work in the space we had to work in. There had been delays in obtaining the piles required by the contract and supplemental contract which we did not anticipate at the time we entered into the contract. The contract required 311 pine piles and 17 more for additional work.

Q. At the time the contract was signed was there any difficulty anticipated in obtaining those pine piles?

A. We simply knew that it would take quite a while to get them.

15 Q. Well, did you think you could get them seasonably?

A. We thought possibly we might; there was a chance. But we couldn't.

We found that we could not obtain the long-leaf piles, that nobody would guarantee to furnish them anywhere near reasonable time, as it was an impracticable thing to creosote long-leaf yellow pine. That information was communicated to the representatives of the United States as soon as we received it, and they decided sometime in January to allow us to substitute short-leaf pine piles for the long-leaf. We then made every possible effort to obtain the short-leaf as quickly as possible, and accepted the first offer that we got to furnish the short-leaf pine in the speediest manner possible. The party supplying it said they could get it in 60 days from the date of the order; but they failed to do so, and we did not get the short-leaf pine until the first week in June, 1906, after repeated efforts to hurry them up.

The white oak piles required by the contract were 366. We undertook immediately to secure the white oak piles, and corresponded with everybody that we knew of in the market for the delivery. We found unexpected difficulty in obtaining them. They were of a dimension which the pile men claimed did not grow except very rarely. One of our correspondents called them freaks. It was impossible to get them; still they could be obtained by culling over large areas. We placed at the earliest moment the first order that we believed would give us the required oak piles in the shortest time and in the surest manner. The first delivery came about the middle of February, 25 in all; in March 66; in April 51; in May none; in June 80. The first delivery in June was the 19th. We received 49 in July; 75 in August; and 25 in September. We would have been ready to have driven our piles 4 or 5 weeks after October 13, 1905 if they had been here.

April 10, 1906 we received the following letter from the representative of the United States:—

16 "Mr. W. H. Ellis, No. 17 Milk St., Boston, Mass.

SIR: Replying to yours of the 3rd inst. requesting an extension of time on your contract for the construction of Pier No. 2; I will state that the Bureau of Yards & Docks has decided that the matter will be held in abeyance pending the completion of the work, at which time the Bureau will make such extensions as the circumstances warrant.

Very respectfully, FRED THOMPSON,
Civil Engineer, U. S. N."

On cross examination by the United States Attorney, the witness testified as follows:

I advised with the Defendant about taking the contract. We read it and the specifications, examined the plans, and made the estimate. We knew that in order to comply with its terms we had got to construct the pier in accordance with the specifications and plans and that, subject to the damage clause, the work had got to

be done in six months from the date of the contract. We understood the number and dimensions and quality of the piles to be provided, had bought piles before, and it was a part of our business to be familiar with the pile market.

(By Mr. FRENCH:)

Q. And information as to the market for piles is as readily accessible, generally speaking, as information as to the market for any other commodity, is it not?

A. Within reasonable limits.

Q. So when you entered into this contract you were not entering into a blind thing?

A. Not absolutely; no, sir.

Q. You were taking your chances, however, of some inconveniences and delays, were you not?

A. There are always those chances to take.

Q. And when you undertake a contract you take it subject to those chances, of course?

A. Always.

Q. Realizing that they exist?

A. Always, and try to reduce them to a minimum.

Q. Certainly; you do the best you can, but take your chances?

A. Yes.

Q. Now will you state a little more explicitly than you have done, and assuming for the moment that it is law that delay in the furnishing of piles, or material of any kind, is such an emer-
17 gency as is contemplated by the statute, what it was that delayed you in the completion of this work?

A. Delay in the decision as to whether we should use short-leaf or long-leaf yellow pine, and also the delay in the delivery of those after it having been decided, and the loss of time in the delivery of the white oaks.

Q. As I understand you, the original contract called for 311 long-leaf pine piles?

A. Yes, sir.

Q. And later 17 more became necessary by reason of the change in the construction?

A. Yes, sir. We knew on October 12, 1905, we would have to go into the market for 311 long-leaf pine piles of certain dimensions; that there might be some chance of our not getting all that we wanted promptly.

Q. That was a contingency which, to a certain extent, at least, you foresaw—a possibility, I will put it that way?

A. A possibility; yes.

Q. Where are the producers of long-leaf *white* piles?

A. Mostly in Virginia and North Carolina.

Q. How many of them are there?

A. There are 4 or 5 or half a dozen.

Q. Are those all there are east of the Mississippi, we will say?

A. They are all that I know of, that is, dealers of large capacities.

Q. Well, are there other smaller dealers elsewhere in the country?

A. I presume there are.
Q. You made no effort to find out?
A. We dealt with the large concerns.
Q. These were concerns which you had been in the habit of dealing with?
A. Yes sir.
Q. And you preferred to deal with them rather than hunt up any others?
A. We knew that their facilities were——
Q. Pardon me. And you preferred to deal with them rather than hunt up any others; is that a fair statement?
A. It is a statement. It is not a question.
Q. Did you prefer—if you object to the form in which I have put the verb, in the substantive—did you prefer?
A. We preferred to deal with the large dealers where we
18 thought we could get them quicker.
We began to drive piles about the first of June, and from that time on there was special delay in the receipt of the white oak.
Q. What was the trouble with the white oak? What was the difficulty in getting those?
A. They were very difficult piles to get in the dimensions called for by the government.
Q. That you knew when you entered into the contract?
A. Well, I didn't fully realize the extreme of it.
Q. You did realize it to some extent?
A. To some extent, yes sir.
Q. You could have realized it fully if you had informed yourself as to the condition of the market at that time?
A. Well, if I had gone into the thing with remarkable fineness I think I might have found out; yes sir.
Q. Yes; but in any of these cases, without making inquiry as to the condition of the market, you signed the contract calling for longleaf pine piles and white oak piles?
A. Yes sir.
Q. Well, wasn't it a clear case, Mr. Perkins, of taking your chances as to those things?
A. A few chances; yes sir.
We finished the pier, October 13, 1906. I remember stating to Mr. Jones that I could not have made better progress on that work and completed it more rapidly if I had employed more men 8 hours instead of employing the number of men I did employ, 9 hours. I mean to say that without any restrictions or mental reservations of any kind.
Q. I will put it in this way: Until comparatively lately, until some time after the finding of this indictment, did you make any continued experiment involving the working of men eight hours a day instead of nine, and putting more men upon the work?
A. No; not any definite experiment with that in view.
Q. Could you have worked one gang of men eight hours, and an extra gang of men for one, two or three hours in addition? Was that possible?

A. I don't think it was possible.

Q. Why not?

A. Because I think that the men who worked the two or three hours one day wouldn't work another day; they would want to get more than two or three hours' pay in.

* * * * * * *

19 Q. How much longer would it have taken to have constructed that pier if you had worked your mechanics or carpenters eight hours a day instead of nine?

A. Well, the best data that I have on it would lead me to say that it would take one-eighth longer, that is, assuming that every man worked just as hard for the nine as the eight,—that each individual man's product would be the same for each hour.

Q. It would have taken one-eighth longer?

A. Yes; but not from the fact that it is a matter of experiment.

Q. Oh, exactly. And would that be making any deduction upon the theory that a man who works eight hours today can do more work and better work tomorrow than if he worked nine?

A. Well, as I told you, provided each hour's work had the same product.

I saw the Olympia in this dry dock No. 1 about two years ago.

At the close of the testimony of the witness, the attorney for the Defendant stated that he should not expect the testimony of the Defendant to vary in any essential particular from that of the witness whom he had called, and that he therefore rested.

No admissions were made by the Defendant other than appears in the foregoing statement of evidence.

In view of the instructions to be given the jury by the court neither counsel addressed the jury. The Defendant requested the court to rule and instruct the jury as follows:

1. Sections 1 and 2 of the Act of August first, 1892, chapter 352 (27 Stat. L. 340) are repugnant to the fifth amendment of the Constitution of the United States, in that they deprive this Defendant of his liberty and property without due process of law.

2. Said sections 1 and 2 are invalid because they limit and restrict the service and employment of laborers and mechanics upon any of the public works of the United States to eight hours in any one calendar day except in case of extraordinary emergency, even when such service and employment for more than eight hours in one calendar day in no wise injuriously affects the public health, safety or welfare, or the health, welfare or safety of the persons so employed.

3. It is competent for the jury on the evidence in the case
20 to find that there were extraordinay emergencies requiring the employment of the persons named in the different counts of said indictment and to return verdicts of not guilty under each of said counts.

4. If Pier No. 2 was being constructed as an approach to Dry Dock No. 1 and was reasonably necessary for the safe and convenient docking for repairs of ships and war vessels of the U. S., and if

without such pier there was a danger of injury and damage to such ships or vessels in docking which would not otherwise exist, and if by reason of unexpected delay in obtaining piles for the construction of said pier it became reasonably necessary to employ the persons named as mechanics in said indictment more than eight hours in one calendar day and more than eight hours on the 13th day of June, 1906, in order to complete the construction of said pier in a reasonable time and in order to lessen as soon as possible the danger of damage or injury to such ships or war vessels of the U. S. in docking the same and in order to facilitate the convenient docking of ships, then it is competent for the jury to find that an extraordinary emergency existed and that this Defendant is not guilty of the offences charged.

5. If the employment of said persons named as mechanics in said indictment more than 8 hours on said 13th day of June was reasonably necessary to prevent continued delay in the completion of said pier and substantial loss to the Defendant, then it is competent for the jury to find an extraordinary emergency requiring such employment.

6. The Defendant did not intentionally violate any such provision unless he knew of the existence of such provision and knew that by his acts or conduct he was violating the same.

7. The evidence does not warrant a verdict that the Defendant is guilty of the offence charged in the first count of the indictment.

8. The evidence does not warrant a verdict that the Defendant is guilty of the offense charged in the second count of the indictment.

9. The contract of the Government with Ellis did not contain any clause forbidding Ellis to carry on his work by permitting men to labor more than eight hours per day.

10. The Act of 1892 under which this indictment is presented does not provide that the Act itself is to form a part of
21 every contract made by the Government in its manifold industries, but on the contrary, left it discretionary, depending upon the nature of the work and the discretion of the officials in charge of the same as to whether eight hours a day should be insisted upon or not when each contract is made.

11. As the Government saw fit to make its contract with Ellis without restricting him to labor at eight hours a day, it thereby authorized him to permit labor to be done for more than eight hours a day.

12. When the Government entered into its contract with Ellis it waived its sovereignty and became practically a person so far as the future execution of the contract was concerned, with only the like remedies that an individual would have for the breach of the same, and governed in like manner by the provisions of the contract. Even if it be admitted that the Act of 1892 was read into the contract and became a part thereof, yet the permission by Ellis to allow men to labor for more than eight hours a day was merely a breach of a civil contract, where the remedy of the Government would be like the remedy of the individual, to recover

in an action for damages for the injury done to the Government, and the Government could not enforce the performance of that contract by prosecuting Ellis and making him guilty of a crime for the non-performance thereof.

13. Said Act of August first, 1892, so far as it applies to this case, is unreasonable and void.

14. Said Act, so far as it applies to this case, is repugnant to the Fifth Amendment of the Constitution of the United States and is void.

15. Said Act, so far as it applies to this case, is an unreasonable and unconstitutional interference with the rights of the people of the United States to have the Government of the United States construct its public works in a reasonable and proper manner.

16. When, by reason of an unexpected, unfor-seen or unprovided for condition, there arises a danger of loss or property or interference with business of an unusual character which it is highly important and reasonably necessary to avoid, then there exists within the meaning of said Act an extraordinary emergency.

22 The presiding judge refused to give any of instructions 1 to 15 inclusive, and declined also to give instruction 16 in the form in which it was requested. He then instructed the jury as follows:

Mr. FOREMAN and GENTLEMEN:—Most of you understand already from instructions which have been given to you here in other cases tried before you, that in a trial of this kind with a jury, questions of law are to be settled by the Court; questions of fact are to be settled by the jury. The jury take the law as it is given to them by the Court, without question. If the Court makes an error in stating the law to the jury, and if the Defendant is thereby prejudiced, he has his remedy; he can appeal, and the appellate court, whatever court it may be, will set any such error right. The jury, in considering their verdict, take the law as stated to them by the Court. Questions of fact are to be settled on the other hand by the jury. The jury's determination of questions of fact is final. The jury are to decide such questions of fact as the Court submits to them. They are to decide them according to the rules of law which the Court lays down for their guidance. All such questions as the credibility of witnesses, the comparative weight to be given to evidence upon one side of a case and on the other are questions for the jury. Those questions are indicated to them by the Court. The jury act upon them according to the rules of law which the Court lays down for their guidance.

Now, it is obvious to you gentlemen that the degree to which different cases depend upon questions of fact or upon questions of law varies. In some cases there will be very little that needs to be stated to the jury to direct them in matters of law. In such cases the question which settles the case is almost wholly an issue of fact. In other cases it is manifest that there will be very little dispute about any question of fact, so that the determination of the case will depend to a very large degree, comparatively, upon the law as laid down by the Court.

The Defendant is indicted here, and is on trial before you, for the alleged violation of a statute of the United States, passed in the year 1892, approved August 1st, 1892, which is called "An Act relating to the Limitation of the Hours of Daily Services of
23 Laborers and Mechanics employed upon the Public Works of the United States and of the District of Columbia." That act begins by providing that the services and employment of all laborers and mechanics who are or may be employed by the Government, or by any contractor or subcontractor upon any of the public works of the United States, is hereby limited and restricted to eight hours in any one calendar day. In the same section the act goes on to provide that it shall be unlawful for any officer of the United States government, or any contractor or sub-contractor whose duty it shall be to employ, direct or control the services of such laborers or mechanics, to require or permit any such laborer or mechanic to work more than eight hours in any calendar day, except in cases of extraordinary emergency.

Then in the second section of the Act it is provided that any contractor or sub-contractor whose duty it shall be to employ, direct or control any laborer or mechanic employed upon any such public works of the United States, who shall intentionally violate any provisions of this Act, shall be deemed guilty of a misdemeanor, and for each and every such offence shall, upon conviction, be punished; and then the law provides what the punishment shall be.

This indictment charges that this Defendant has committed the offence described in the Act of which I have spoken to you in two instances. The first count of the indictment charges that on June 13th, 1906, the Defendant being then and there a contractor whose duty it was to employ the services of certain mechanics upon one of the public works of the United States, to wit, upon the construction of a certain pile and timber pier known as Pier No. 2 at the United States Navy Yard at Boston, did, as such contractor as aforesaid, then and there intentionally require and permit a certain mechanic, to wit, Amable De Gaust, to work, and said De Gaust did work on said public work for more than eight hours on a certain calendar day, to wit, on the 13th day of June, there being then and there no extraordinary emergency requiring his employment on the public work referred to for more than eight hours a day. And in the second count similar allegations are made, except that the man as to whom it is charged that he was permitted intentionally by the Defendant to work more than eight hours on June 13th was Solomon
24 Moore. Both of those men have been called as witnesses; both of them you have seen.

Before proceeding to consider just what must be proved by the Government in order to support these charges of violation of this statute, you should remember, as has been stated to you by counsel, that no individual opinions as to the policy of such a law as this are to be considered in any way. They are not to enter into your determination of the case. You may believe that it is a wise and a just law; you may believe that the public interest requires that laborers and mechanics engaged on these public works should not

be required or permitted to work over eight hours a day, or you may believe just the contrary. You may believe that it is an unwise law. You or I may hold any opinion upon that subject of which we are persuaded; but we are here to see that the laws of the United States as they stand are executed. Congress, which has the power, and is entrusted with the duty, of passing laws for the government of this country, has thought fit to enact this law, and, without any regard to opinions which any of you or I may hold about it, we are here under the sworn duty of seeing that that law is enforced.

It has been claimed in this case, although it is not a matter which has been discussed before you—that such a law as this, is a law which Congress had no right to pass. It has been contended that the Constitution of the United States forbids the enactment of such a law as this. Whether that is true or not is one of those questions of law of which I have spoken to you. The Court in this case has ruled that there is nothing in the Constitution of the United States which forbids the passing of this law; in other words, that this law is constitutional. Therefore no such question as that is to be allowed to enter into your minds in settling the case. If the decision of the Court on that point is wrong, that also is a question which will be settled by the appellate court, and it is a question in regard to which the rights of the Defendant will be fully protected in that way. We have nothing to do with that question here.

There has been a decision, gentlemen, by the Supreme Court of the United States upon this question of constitutionality,—not a decision upon this particular statute, but a decision regarding a State statute, a statute, I think, enacted by the legislature of the State of Kansas, somewhat similar—nearly the same—in its provisions. The Supreme Court of the United States, in holding that the Kansas law to which I have referred was constitutional,—that there is nothing in the Constitution of the United States which forbade the legislature of Kansas to enact it,—said that "It may be that the State intended to give its sanction to the view held by many, that, all things considered, the general welfare of employees, mechanics and workmen upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen, and enable them to better discharge the duties appertaining to citizenship." It may be fair in this case to assume that Congress, in enacting this law, had the same intention as was there referred to by the Supreme Court of the United States.

In proceeding to the consideration of the question whether the Defendant has been proved guilty or not of violating this statute, it is important to notice the different elements constituting the offence which the Government must show to have existed in order to establish his guilt of the offence charged. The statute, as you have noticed, makes a number of different elements necessary in

order to constitute the offence. It is incumbent upon the Government to prove those elements, as they are alleged in the indictment which I have read to you, beyond a reasonable doubt.

Most of you have learned already from the instructions given you here in other cases, what is meant by a reasonable doubt. You have been told that a reasonable doubt is not a purely fanciful, hypothetical or imaginary doubt, not such a doubt as can be imagined in regard to almost any question that can be put; but it means, in opposition to that, such a doubt as a reasonable man allows, exercising his reason, to affect him in the important affairs of his life. The elements of this offense, therefore, must be proved beyond a reasonable doubt in that sense.

Now, what are the elements which go to constitute this
26 offence? I will run them over briefly.

In the first place, the Government must prove beyond a reasonable doubt that the Defendant was under contract with the United States, or its duly authorized agent.

It must prove that the work to be done under the contract was a public work of the United States.

It must prove that the Defendant was under duty,—bound by his contract,—to employ mechanics, and did employ, or cause to be employed, the persons named in the two counts of the indictment as mechanics.

It must prove that the person employed was a mechanic.

It must prove that the Defendant intentionally required or permitted such mechanics to work more than eight hours in any calendar day during the construction of the work, and before the finding of the indictment.

And lastly, it must prove that no case of extraordinary emergency existed which justified the Defendant in requiring or permitting such mechanic to work more than eight hours in any one calendar day on such public work, the statute containing the provision which I have read to you, "except in case of extraordinary emergency."

All those things are necessary elements of the offence charged. All those things are to be proved beyond a reasonable doubt. I instruct you, gentlemen, as requested by the Defendant, that "it is the duty of the jury to return a verdict that this Defendant is not guilty of any offence charged in this indictment, unless the offence therein charged is proved beyond a reasonable doubt."

"Even if the jury should believe from the evidence in the case that it is probable that this Defendant is guilty of any offence charged in this indictment, it is nevertheless their duty to return a verdict of not guilty, unless they are also satisfied beyond a reasonable doubt of his guilt."

"It is the duty of the jury to return a verdict that the Defendant is not guilty of the offence charged in said indictment unless it is proved beyond a reasonable doubt that there was no extraordinary
emergency requiring the employment of the persons named
27 in said indictment more than eight hours on the 13th day of June, 1906."

Now, gentlemen, in regard to some of these elements to be proved

by the Government beyond a reasonable doubt, there have been admissions made here during the trial on behalf of this Defendant. The admissions cover some of the elements which I have told you are necessary to be proved beyond a reasonable doubt by the Government. Let us see what these are.

The first element to which I referred was this: The Defendant must have been under contract with the United States, or its duly authorized agent. The Defendant has admitted that he was a contractor with the United States for the construction of this Pier No. 2, and the contract has been put in evidence here before you. I instructed you, secondly, that the work to be done under the contract must be proved to be a public work of the United States. The Defendant has admitted that Pier No. 2, which he contracted to build, was a public work of the United States.

I instructed you that it must be proved that the Defendant was bound by his contract, that he was under a duty, to employ mechanics, and did employ, or cause to be employed, the persons named in the different counts of the indictment. The Defendant admitted that it was his duty to furnish labor for that public work under the contract, and that in performing that duty he did employ De Gaust and Moore, who are the persons named in those two counts.

I told you that it was necessary to prove that the person employed was a mechanic. The Defendant has admitted that each of these men was a mechanic.

I instructed you that it must be shown that the Defendant intentionally required or permitted such mechanic to work more than eight hours in any calendar day during the construction of the work, and before the finding of the indictment. It has been admitted by the Defendant that he knew that De Gaust and Moore were required and permitted to work more than eight hours on June 13th, the calendar day named in the indictment; and I instruct you, gentlemen, that if all the other elements of the offence are present, that would be an intentional violation of the statute on the Defendant's part.

If the Defendant intended to permit these men to work over
28 eight hours on the calendar day named, then he intended to violate the statute, and there seems to be thus far no question that the elements to which I have referred already are established here.

It remains to be established, and established also, like all the other elements referred to, beyond a reasonable doubt, that there was no case or extraordinary emergency, such as is contemplated by the Act, which would justify the Defendant requiring or permitting these men to work more than eight hours. This is the last element necessary to constitute the offence, the last element the existence of which it is incumbent upon the Government to satisfy you beyond a reasonable doubt.

What then, is a case of extraordinary emergency, such as is contemplated in this act of Congress? Upon that point, I instruct you that an extraordinary emergency, such as contemplated by the Act, is the sudden, unexpected happening of something not of the usual, customary or regular kind, demanding prompt

action to avert imminent danger to life, limb, health or property. The possibility of danger is not enough. The peril must be sudden, unusual, imminent and actual in order to constitute an "extraordinary emergency" such as the statute contemplates.

It will be very clear to you gentlemen, in view of that definition, that no probability of loss to the contractor, not brought about by an emergency of that sort, can possibly constitute a case of "extraordinary emergency" within the meaning of the Act. Of loss not so caused the contractor would have to be considered, for the purpose of this case, as taking the risk, as an ordinary risk of his business. It would not be an extraordinary risk; it would not be an extraordinary emergency.

Now, gentlemen, there is before you, in regard to the existence of a case of extraordinary emergency, the evidence introduced by the government, and also the evidence introduced in behalf of the Defendant.

I instruct you, that you would be justified, on the government's evidence alone, provided that you believe the witnesses who have testified for the government—and the extent to which witnesses are to be believed or disbelieved is always a question for
29 the jury—I instruct you that, providing that you believe them, you are justified, on the government's evidence alone, in finding it to be sufficiently proved that no case of extraordinary emergency existed here which justified the Defendant in requiring or permitting these men to work more than eight hours on June thirteenth. The circumstances which are disclosed by the government's evidence and the Defendant's admissions are sufficient to negative the existence of a case of extraordinary emergency such as would afford that justification to the Defendant, or such as would justify him in permitting the men to work over eight hours, as he has admitted he did.

In addition to the evidence introduced by the government, the Defendant has introduced evidence here which you have heard, which was offered for the purpose of showing, and which it is claimed does show, that such a case of extraordinary emergency did exist.

I instruct you that the evidence so introduced by the Defendant is not sufficient for the purpose, and that it does not show the existence of any case of extraordinary emergency.

Therefore, gentlemen, on all the evidence in the case which is before you, I rule, as matter of law, that no case of extraordinary emergency existed which would excuse working these men over time; or which would authorize working them over eight hours on June thirteenth, 1906; none which affords justification to the Defendant in requiring or permitting them to work more than eight hours on June thirteenth, 1906.

Now, gentlemen, it is for you to find a verdict according to the instructions which have been given to you in the case, taking the law as it has been laid down to you by the Court, and to say whether the government has or has not proved the Defendant to be guilty of the offence charged.

To each refusal to rule and instruct the jury as requested the Defendant seasonably excepted. The Defendant also seasonably excepted to the Judge's charge so far as the same differed in form and substance from the instructions requested.

The Defendant also seasonably excepted to the definition given by the court of an extraordinary emergency, that is to say—to the following instruction contained in said charge.

30 "What, then, is a case of extraordinary emergency, such as is contemplated in this act of Congress? Upon that point, I instruct you that an extraordinary emergency, such as contemplated by the Act, is the sudden, unexpected happening of something not of the usual, customary or regular kind, demanding prompt action to avert imminent danger to life, limb, health or property. The possibility of danger is not enough. The peril must be sudden, unusual, imminent and actual in order to constitute an "extraordinary emergency" such as the statute contemplates.

Now, it will be very clear to you gentlemen, in view of that definition, that no probability of loss to the contractor, not brought about by an emergency of that sort, can possibly constitute a case of "extraordinary emergency" within the meaning of the Act. Of loss not so caused the contractor would have to be considered, for the purpose of this case, as taking the risk, as an ordinary risk of his business. It would not be an extraordinary risk; it would not be an extraordinary emergency."

The Defendant also seasonably excepted to the ruling and instruction in said charge that—

"Therefore, gentlemen, on all the evidence in the case which is before you, I rule, as matter of law, that no case of extraordinary emergency existed which would excuse working these men over time; and which would authorize working men over eight hours on June thirteenth, 1906; none which affords justification to the Defendant in requiring or permitting them to work more than eight hours on June thirteenth, 1906.

Now, gentlemen, it is for you to find a verdict according to the instructions which have been given to you in the case, taking the law as it has been laid down to you by the Court, and to say whether the government has or has not proved the Defendant to be guilty of the offence charged."

The Defendant prays that his exceptions may be allowed.

WILLIAM H. ELLIS.
BOYD B. JONES,
His Attorney.

Allowed; December 22, 1906.

FREDERIC DODGE,
Judge U. S. District Court.

And now, on this twenty-second day of December, A. D. 1906, it is considered by the Court that the said William H. Ellis do pay a fine of Two Hundred Fifty Dollars on the first count of said In-

dictment, and Two Hundred Fifty Dollars on the second count of said Indictment, and to stand committed until the same be paid.

A true Record:

Attest: FRANK H. MASON, *Clerk.*

31 *Petition for Writ of Error.*

(Filed December 22, 1906.)

To the Honorable the Judge of the District Court of the United States *of* the District of Massachusetts:

Now comes William H. Ellis, the Defendant in the above entitled cause, and complains that in the record and proceedings and also in rendition of judgment in a plea between the United States and the Defendant, tried in the District Court of the United States for the said District, at the September Term, A. D. 1906, in which a judgment was rendered against him on the eighteenth day of October, A. D. 1906, manifest error hath happened, to the great damage of said Defendant.

Wherefore he prays for the allowance of a Writ of Error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

WILLIAM H. ELLIS.
BOYD B. JONES,
His Attorney.

32 *Assignment of Errors.*

(Filed December 22, 1906.)

And now comes William H. Ellis, the Defendant in the above entitled cause, and files this his Assignment of Errors committed upon the trial of said cause, to wit:

1. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's first request, namely, that

Sections 1 and 2 of the Act of August 1, 1892, c. 352 (27 Stat. at Large, 340) are repugnant to the fifth amendment of the Constitution of the United States, in that they deprive this Defendant of his liberty and property without due process of law.

2. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's second request, namely, that

Said sections 1 and 2 are invalid because they limit and restrict the service and employment of laborers and mechanics upon any of the public works of the United States to eight hours in any one calendar day except in case of extraordinary emergency, even when such service and employment for more than eight hours in one calendar day in no wise injuriously affects the public health, safety or welfare, or the health, welfare or safety of the persons so employed.

3. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's third request, namely, that

It is competent for the jury on the evidence in the case to find that there were extraordinary emergencies requiring the employment of the persons named in the different counts of said indictment, and to return verdicts of not guilty under each of said counts.

4. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's fourth request, namely, that

If Pier No. 2 was being constructed as an approach to Dry Dock No. 1 and was reasonably necessary for the safe and convenient docking for repairs of ships and war vessels of the United States, and if without such pier there was a danger of injury and damage to
33 such ships or vessels in docking which would not otherwise exist, and if by reason of unexpected delay in obtaining piles for the construction of said pier it became reasonably necessary to employ the persons named as mechanics in said indictment more than eight hours in one calendar day and more than eight hours on the 13th day of June, 1906, in order to complete the construction of said pier in a reasonable time and in order to lessen as soon as possible the danger of damage or injury to such ships or war vessels of the United States in docking the same and in order to facilitate the convenient docking of ships, then it is competent for the jury to find that an extraordinary emergency existed and that this Defendant is not guilty of the offences charged.

5. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's fifth request, namely, that

If the employment of said persons named as mechanics in said indictment more than 8 hours on said 13th day of June was reasonably necessary to prevent continued delay in the completion of said pier and substantial loss to the Defendant, then it is competent for the jury to find an extraordinary emergency requiring such employment.

6. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's sixth request, namely, that

The Defendant did not intentionally violate any such provision unless he knew of the existence of such provision and knew that by his acts or conduct he was violating the same.

7. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's seventh request, namely, that

The evidence does not warrant a verdict that the Defendant is guilty of the offense charged in the first count of the indictment.

8. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's eighth request, namely that

The evidence does not warrant a verdict that the Defendant is guilty of the offence charged in the second count of the indictment.

9. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's ninth request, namely, that

The contract of the Government with Ellis did not contain
34 any clause forbidding Ellis to carry on his work by permitting men to labor more than eight hours per day.

10. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's tenth request, namely, that

The Act of 1892 under which this indictment is presented, does not provide that the Act itself is to form a part of every contract made by the Government in its manifold industries, but on the contrary, left it discretionary, depending upon the nature of the work and the discretion of the officials in charge of the same as to whether eight hours a day should be insisted upon or not when each contract is made.

11. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's eleventh request, namely, that

As the Government saw fit to make its contract with Ellis without restricting him to labor at eight hours a day, it thereby authorizes him to permit labor to be done for more than eight hours a day.

12. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's twelfth request, namely, that

When the Government entered into its contract with Ellis it waived its sovereignty and became practically a person so far as the future execution of the contract was concerned, with only the like remedies that an individual would have for the breach of the same, and governed in like manner by the provisions of the contract. Even if it be admitted that the Act of 1892 was read into the contract and became a part thereof, yet the permission by Ellis to allow men to labor for more than eight hours a day was merely a breach of a civil contract, where the remedy of the Government would be like the remedy of the individual, to recover in an action for damage for the injury done to the Government, and the Government could not enforce the performance of that contract by prosecuting Ellis and making him guilty of a crime for the non-performance thereof.

13. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's thirteenth request, namely, that

Said Act of August first, 1892, so far as it applies to this case, is unreasonable and void.

14. The Court erred in refusing to rule and instruct the
35 jury in accordance with the Defendant's fourteenth request, namely, that

Said Act, so far as it applies to this case, is repugnant to the Fifth Amendment of the Constitution of the United States and is void.

15. The Court erred in refusing to rule and instruct the jury in accordance with Defendant's fifteenth request, namely, that

Said Act, so far as it applies to this case, is an unreasonable and unconstitutional interference with the rights of the people of the United States to have the Government of the United States construct its public works in a reasonable and proper manner.

16. The Court erred in refusing to rule and instruct the jury in accordance with the Defendant's sixteenth request, namely, that

When, by reason of an unexpected, unfor-seen or unprovided for condition, there arises a danger of loss of property or interference with business of an unusual character which it is highly im-

portant and reasonably necessary to avoid, then there exists within the meaning of said Act an extraordinary emergency.

17. The Court erred in ruling and instructing the jury in form and substance differing from the request of the Defendant, as follows:—

"It has been admitted by the Defendant that he knew that De Gaust and Moore were required and permitted to work more than eight hours on June 13th, the calendar day named in the indictment, and I instruct you, gentlemen, that if all the other elements of the offence are present that would be an intentional violation of the statute on the Defendant's part. If the Defendant intended to permit these men to work over eight hours in the calendar day named, then he intended to violate the statute, and there seems to be thus far no question that the elements to which I have referred already are established here."

18. The Court erred in ruling and instructing the jury that

"An extraordinary emergency such as is contemplated by the Act, is the sudden, unexpected happening of something not of the usual, customary or regular kind, demanding prompt action to avert imminent danger to life, limb, health or property. The possibility of danger is not enough. The peril must be
36 sudden, unusual, imminent and actual in order to constitute an extraordinary emergency such as the statute contemplates.

Now, it will be very clear to you gentlemen, in view of that definition, that no probability of loss to the contractor, not brought about by an emergency of that sort, can possibly constitute a case of "extraordinary emergency" within the meaning of the Act. Of loss not so caused the contractor would have to be considered, for the purpose of this case, as taking the risk, as an ordinary risk of his business. It would not be an extraordinary risk; it would not be an extraordinary emergency.

19. The Court erred in ruling and instructing the jury that provided the jury believed the witnesses, they were justified on the government's evidence alone, in finding it to be sufficiently proved that no case of extraordinary emergency existed here which justified the Defendant in requiring or permitting these men to work more than eight hours on June 13th. The circumstances which are disclosed by the government's evidence and the Defendant's admissions are sufficient to negative the existence of a case of extraordinary emergency such as would afford that justification to the Defendant, or such as would justify him in permitting the men to work over eight hours, as he has admitted he did.

20. The Court erred in ruling and instructing the jury that the evidence introduced by the Defendant is not sufficient to show that a case of extraordinary emergency within the meaning of the statute did exist, and that it does not show the existence of any case of extraordinary emergency.

The Court erred in ruling and instructing the jury as follows:

"Therefore, gentlemen, on all the evidence in the case which

is before you, I rule, as matter of law, that no case of extraordinary emergency existed which would excuse working these men over time; and which would authorize working men over eight hours on June thirteenth, 1906; none which affords justification to the Defendant in requiring or permitting them to work more than eight hours on June thirteenth, 1906.

Now, gentlemen, it is for you to find a verdict according to the instructions which have been given to you in the case,
37 taking the law as it has been laid down to you by the Court, and to say whether the government has or has not proved the Defendant to be guilty of the offense charged."

WILLIAM H. ELLIS.
BOYD B. JONES,
His Attorney.

38 D. C.—Form 148.

Bond on Writ of Error.

Filed December 22, 1906.

Know all Men by these Presents, That we, William H. Ellis of Boston in the Commonwealth of Massachusetts, as principal, and The United States Fidelity and Guaranty Company, a corporation duly organized under the laws of the State of Maryland and having a usual place of business in Boston, as surety, are held and firmly bound unto The United States of America in the full and just sum of Two Hundred and Fifty (250) Dollars to be paid to the said The United States of America, its certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, successors and assigns, jointly and severally, by these presents. Sealed with our seals and dated this 22nd day of December in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a District Court of the United States for the District of Massachusetts, in a suit depending in said Court between The United States of America by Indictment against said William H. Ellis judgment was rendered against the said William H. Ellis and the said William H. Ellis having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States citing and admonishing it to be and appear in the Supreme Court of the United States, in the city of Washington, on the third Monday of January next

Now, the condition of the above obligation is such, That if the said William H. Ellis shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good,

then the above obligation to be void; else to remain in full force and virtue.

WILLIAM H. ELLIS. [SEAL.]
THE UNITED STATES FIDELITY & GUARANTY CO.
T. J. FALVEY &
GEO. W. BERRY, [SEAL.]
True and Lawful Attorneys.

Sealed and delivered in presence of
FRANK H. CARRUTHERS,
As to William H. Ellis.
D. R. PENNELL,
As to Surety.

Approved:
FREDERIC DODGE,
Judge U. S. District Court.

39 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Unied States of America, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, on the third Monday of January next, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the District of Massachusetts in a cause entitled United States by Indictment, Number 444, *versus* William H. Ellis, Defendant wherein the said defendant is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge Judge of the District Court of the United States for the District of Massachusetts, this 22nd day of December, in the year of our Lord one thousand nine hundred and six.

FREDERIC DODGE,
U. S. District Judge.

40 UNITED STATES OF AMERICA,
District of Massachusetts, ss:

BOSTON, *December* 22, 1906.

I hereby certify that on the twenty-second day of December, 1906, I accept service of the within citation, and acknowledge due and legal service of the same.

ASA P. FRENCH,
United States Attorney.

41 District Court of the United States, District of Massachusetts.

No. 444.

UNITED STATES BY INDICTMENT
vs.
WILLIAM H. ELLIS.

Order that Writ of Error Operate as a Supersedeas.

December 22, 1906.

DODGE, *J.:*

Whereas lately sentence has been pronounce- against William H. Ellis, the Defendant under said indictment, and a Writ of Error procured by the said Defendant to reverse the judgment in this cause; and

Whereas a Citation to the United States to be and appear at the Supreme Court of the United States at the City of Washington pursuant to said Writ of Error has been issued, and has been served on the Attorney of the United States for this District.

It is Ordered that the said Writ of Error operate as a stay of proceedings under said sentence, and that the execution thereof be superseded pending said Writ of Error.

By the Court:

FRANK H. MASON, *Clerk.*

A true copy:
Attest: FRANK H. MASON, *Clerk.*

42 District Court of the United States, District of Massachusetts.

No. 444.

THE UNITED STATES BY INDICTMENT
versus
WILLIAM H. ELLIS, Defendant.

Order Admitting Defendant to Bail Pending Writ of Error.

December 22, 1906.

DODGE, *J.:*

Whereas, lately at the said District Court sentence was pronounced against the said Defendant, and the said Defendant having obtained a Writ of Error to remove the said cause to the Supreme Court of the United States, at Washington, to reverse the judgment therein, and a citation having been issued to the United States to be and appear at the said Supreme Court of the United States at Washington pursuant to said Writ of Error, which citation has been served upon the Attorney of the United States for said District.

It is Ordered that the said Defendant be admitted to bail pending said Writ of Error, and that he recognize with sufficient surety in the sum of one thousand dollars.

By the Court:

FRANK H. MASON, *Clerk.*

A true copy:
Attest:
FRANK H. MASON, *Clerk.*

43 UNITED STATES OF AMERICA,
Massachusetts District, ss:

Memorandum.

At a District Court of the United States begun and holden at Boston, within and for the District of Massachusetts, on the first Tuesday of December in the year of our Lord one thousand nine hundred and six. To wit: December 22, 1906.

No. 444.

THE UNITED STATES BY INDICTMENT
versus
WILLIAM H. ELLIS.

Personally appeared William H. Ellis of Boston and Frederick E. Newell of Hingham and John J. Walsh of Boston all in said District, and acknowledged themselves to be severally indebted unto the United States of America, in the sums following, viz: the said William H. Ellis as principal in the sum of one thousand dollars, and the said Newell and Walsh as sureties in the sum of one thousand dollars, to be levied on their goods or chattels, lands or tenements, and in want thereof upon their bodies, to the use of the said United States, if default be made in the performance of the Condition here following

Whereas, the said William H. Ellis, Defendant has this day been ordered to be admitted to bail pending the Writ of Error issued in this cause, returnable to the Supreme Court of the United States at Washington on the third Monday of January next.

Now, the condition of this Recognizance is such, that if the said William H. Ellis shall personally appear before the District Court of the United States to be holden at Boston, within and for the District aforesaid whenever required after the Mandate of the said Supreme Court of the United States shall be received in this cause to answer to such matters and things in the premises as shall be objected against him on behalf of the said United States, and more especially to such judgment as shall be awarded against him therein, and shall do and receive that which by this Court
44 shall be enjoined upon him in relation to the premises and not depart without license, and shall meanwhile from term to term and day to day appear in this Court whenever lawfully re-

quired in relation to the premises then the above obligation to be void and of no effect, otherwise to abide in full force, power and virtue.

Attest: FRANK H. MASON, *Clerk.*

A true copy:
Attest: FRANK H. MASON, *Clerk.*

45 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Frank H. Mason, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing is a true copy of the record in the cause entitled,

No. 444.

THE UNITED STATES BY INDICTMENT
versus
WILLIAM H. ELLIS.

in said District Court determined, the Petition for Writ of Error, the Assignment of Errors, the Bond to the United States on Writ of Error issued on said Petition, and also the original Citation issued on said Writ of Error, with the Acknowledgment of Service thereon; also true and attested copies of the Order that said Writ of Error operate as a Supersedeas, the Order Admitting Defendant to Bail pending Writ of Error, and the Recognizance of Defendant.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this tenth day of January, A. D. 1907.

[Seal of the District Court, Massachusetts.]

FRANK H. MASON, *Clerk*

Endorsed on cover: File No. 20,532. Massachusetts D. C. U. S. Term No. 567. William H. Ellis, plaintiff in error, *vs.* The United States. Filed January 16th, 1907. File No. 20,532.

FILE COPY.

FILED.
APR 22 1907
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

No. 567 OCTOBER TERM, 1906.

WILLIAM H. ELLIS, Plaintiff in Error,

vs.

THE UNITED STATES, Defendant in Error.

In Error to the District Court of the United States for the District of Massachusetts.

BRIEF OF THE PLAINTIFF IN ERROR.

D. T. WATSON,
Attorney for Plaintiff.

Smith Bros. Co. Inc., Franklin Print. 412 Grant Street, Pittsburgh.

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IN THE

Supreme Court of the United States.

No. 567 OCTOBER TERM, 1906.

WILLIAM H. ELLIS, Plaintiff in Error,

vs.

THE UNITED STATES, Defendant in Error.

In Error to the District Court of the United States for the District of Massachusetts.

Facts.

On October 13th, 1905, the United States entered into a contract with William H. Ellis, the defendant, by which the defendant agreed to construct and complete pier No. 2 at the Navy Yards in Boston, Massachusetts, and do certain dredging work within six calendar months. The officer of the United States was given full control of the work and power to decide all disputes.

So far as the record shows, the contract contained no references whatever to the Act of 1892, but did contain, *inter alia,* the following provisions:

> "The contractor shall employ only competent, careful, orderly persons upon the work, and if at any time it shall appear to the officer in charge that any person employed upon the work is incompetent, careless, reckless or disorderly or disobeys or evades orders or instructions or shirks his duty, such person shall be immediately discharged from and not again employed upon the work."

There was no provision restricting the hours of labor:

> "*Unavoidable delays* are such as result from causes which are undoubtedly, or may reasonably be presumed to be beyond the control of the contractor, such as acts of Providence, unusual storms, fires (not the result of negligence), fortuitous events, inevitable accidents, etc."

The piles to be used were to be of straight, long-leaf yellow pine, not less than 8 inches in diameter at the point, and 12 inches in diameter at a point 5 feet from the butt.

The defendant was indicted because he (p. 3):

> "did, as such contractor as aforesaid, then and there intentionally require and permit a certain mechanic, to wit, Amable De Gaust to work, and said De Gaust did work on the said public work for more than 8 hours on a certain calendar day, to wit, on said 13th day of June, there being then and there no extraordinary emer-

gency requiring the employment of said De Gaust on said public work for more than eight hours on said day."

The second count of the indictment was the same, except that it changed the name of the employee to Solomon Moore.

The Government called in support of its case only Fred Thompson, a civil engineer in the Navy who had charge of the construction of the pier. It was his duty to see (p. 9) that the pier was built in accordance with the contracts and specifications, and he, knowing the conditions of the work, knew that men were being employed on the work and knew that they were being employed more than eight hours on June 13th, and that there was no complaint or disturbance arising from that fact. He did not object to it—nor did the Navy Department, nor the men employed, object.

This Navy Yard in Boston is the home of the North Atlantic Squadron (p. 11) and the work in the construction of the pier was, as this witness testified,

"pretty much rush work,"

and the defendant used every effort to complete the work as rapidly as possible, including working over time.

The construction of this pier, the witness said (p. 12), was reasonably necessary for the safe docking of the ships.

The defendant called Seth Perkins, who was associated in business with the defendant and was a civil engineer (p. 13) and he testified:

"The defendant knew that the men were employed on that work more than eight hours on June 13th, 1906. On that day I was pushing the work to completion in all ways as rapidly as I could, including overtime working. The defendant was then employing on the construction of the pier all the men that could be worked there to advantage, and was doing everything that could be done to complete it as rapidly as possible."

There had been delays in obtaining the piles and they found they could not obtain the long-leaf piles anywhere near reasonable time. They also found unexpected difficulty in obtaining the white oak piles. It was impossible to get them (p. 14) and the deliveries were all late.

The two men worked nine (9) hours a day (p. 17).

Among other things, the defendant requested the court to charge the jury:

"(1) Sections 1 and 2 of the Act of August 1, 1892, Chapter 352 (27 Stat. L. 340) are repugnant to the Fifth Amendment of the Constitution of the United States in that they deprive this defendant of his liberty and property without due process of law."

"(2) Said Sections 1 and 2 are invalid, because they limit and restrict the service and employment of laborers and mechanics upon any of the public works of the United States to eight hours in any one calendar day, except in case of extraordinary emergency, even when such service and employment for more than eight hours in one calendar day in no wise injuriously affects the public health, safety or welfare, or the health, welfare or safety of the persons so employed."

"(3) It is competent for the jury, on the evidence in the case to find that there were extraordinary emergencies requiring the employment of the persons named in the different counts of said indictment and to return verdicts of not guilty under each of said counts." (p. 17.)

"(6) The defendant did not intentionally violate any such provision unless he knew of the existence of such provision and knew that by his acts or conduct he was violating the same." (p. 18.)

"(9) The contract of the Government with Ellis did not contain any clause forbidding Ellis to carry on his work by permitting men to labor more than eight hours per day."

"(10) The Act of 1892 under which this indictment is presented, does not provide that the Act itself is to form a part of every contract made by the Government in its manifold industries, but on the contrary, left it discretionary, depending upon the nature of the work and the discretion of the officials in charge of the same, as to whether eight hours a day should be insisted upon or not when each contract is made."

The Court below charged the jury:

"The Court in this case has ruled that there is nothing in the Constitution of the United States which forbids the passing of this law; in other words, that this law is constitutional."

The Court further instructed the jury (p. 23):

"It has been admitted by the defendant that he knew that De Gaust and Moore were required and per-

> mitted to work more than eight hours on June 13th, the calendar day named in the indictment; and I instruct you, gentlemen, that if all the other elements of offense are present, *that would be an intentional violation* of the Statute on the defendant's part. If the defendant intended to permit these men to work over eight hours on the calendar day named, then he intended to violate the Statute and there seems to be thus far no question that the elements to which I have referred already are established here."

On the question of extraordinary emergency, the Court further charged (p. 23):

> "What then, is a case of extraordinary emergency, such as is contemplated in this Act of Congress? Upon that point I instruct you that extraordinary emergency, such as contemplated by the Act, is the sudden, unexpected happening of something not of the usual, customary or regular kind, demanding prompt action to avoid imminent danger to life, limb, health or property. The possibility of danger is not enough. The peril must be sudden, unusual, imminent and actual in order to constitute an extraordinary emergency such as the Statute contemplates."

He further charged (p. 24):

> "I instruct you that, providing that you believe them, you are justified on the Government's evidence alone in finding it to be sufficiently proved that no case of extraordinary emergency existed here which justified the defendant in requiring or permitting these men to work more than eight hours on June 13th * * *

"I instruct that the evidence so introduced by the defendant is not sufficient for the purpose and that it does not show the existence of any case of extraordinary emergency. Therefore, gentlemen, on all the evidence in the case which is before you, I rule as a matter of law, that no case of extraordinary emergency existed which would authorize working these men over eight hours on June 13, 1906; none which affords justification to the defendant in requiring or permitting them to work more than eight hours on June 13, 1906.

"Now, gentlemen, it is for you to find a verdict according to the instructions which have been given to you in this case, taking the law as it has been laid down to you by the court, and to say whether the Government has or has not proved the defendant to be guilty of the offense charged."

The jury found the verdict of guilty, and the court sentenced the defendant to a fine of $250 on the first count and $250 on the second count of the indictment, and to stand committed until the same was paid.

To this judgment this writ of error is taken.

Specification of Errors.

FIRST. The Court erred in charging the jury

"It has been admitted by the Defendant that he knew that De Gaust and Moore were required and permitted to work more than eight hours on June 13th, the calendar day named in the indictment, *and I instruct you, gentlemen,* that if all the other elements of the offense are present *that would be an intentional* violation of the statute on the Defendant's part. If the Defendant intended to permit these men to work over eight hours in the calendar day named, *then he intended to violate the statute,* and there seems to be thus far no question that the elements to which I have referred already are established here."

SECOND. The Court erred in refusing to refusing to charge, as requested, that

"The defendant did not intentionally violate any such provision unless he knew of the existence of such provision and knew that by his acts or conduct he was violating the same.

THIRD. The Court erred in charging the jury as follows:

"It has been claimed in this case, although it is not a matter which has been discussed before you, that such

a law as this is a law which Congress had no right to pass. It has been contended that the Constitution of the United States forbids the enactment of such a law as this. Whether that is true or not is one of those questions of law of which I have spoken to you. The court in this case, however, ruled that there is nothing in the Constitution of the United States which forbids the passing of this law; in other words, that this law is constitutional."

FOURTH. The Court erred in refusing to rule and instruct the jury, as requested, that

"Sections 1 and 2 of the Act of August 1, 1892, c. 352, (27 Stat. at Large 340) are repugnant to the fifth amendment of the Constitution of the United States, in that they deprive this Defendant of his liberty and property without due process of law."

FIFTH. The Court erred in refusing to rule and instruct the jury, as requested, that

Said sections 1 and 2 are invalid because they limit and restrict the service and employment of laborers and mechanics upon any of the public works of the United States to eight hours in any one calendar day except in case of extraordinary emergency, even when such service and employment for more than eight hours in one calendar day in no wise injuriously affects the public health, safety or welfare or the health, welfare or safety of the persons so employed.

SIXTH. The Court erred in refusing to rule and instruct the jury, as requested, that

> When the Government entered into its contract with Ellis it waived its sovereignty and became practically a person so far as the future execution of the contract was concerned, with only the like remedies that an individual would have for the breach of the same, and governed in like manner by the provisions of the contract. Even if it be admitted that the Act of 1892 was read into the contract and because a part thereof, yet the permission by Ellis to allow men to labor for more than eight hours a day was merely a breach of a civil contract, where the remedy of the Government would be like the remedy of the individual, to recover in an action for damage for the injury done to the Government, and the Government could not enforce the performance of that contract by prosecuting Ellis and making him guilty of a crime for the non-performance thereof.

SEVENTH. The Court erred in ruling and instructing the jury

> "Therefore, gentlemen, on all the evidence in the case which is before you, I rule, as matter of law, that no case of extraordinary emergency existed which would excuse working these men overtime; and which would authorize working men over eight hours on June thirteenth, 1906; none which affords justification to the Defendant in requiring or permitting them to work more than eight hours on June thirteenth, 1906."

EIGHTH. The Court erred in refusing to rule and instruct the jury, as requested, that

> The Act of 1892 under which the indictment is presented, does not provide that the Act itself is to form a part of every contract made by the Government in its manifold industries, but on the contrary, left it discretionary, depending upon the nature of the work and the discretion of the officials in charge of the same as to whether eight hours a day should be insisted upon or not when each contract is made.

NINTH. The Court erred in refusing to rule and instruct the jury, as requested, that

> As the Government saw fit to make its contract with Ellis without restricting him to labor at eight hours a day, it thereby authorizes him to permit labor to be done for more than eight hours a day.

POINTS OF LAW.

The questions intended to be here raised and discussed are:

(1) The second Section of the Act of 1892 punishes only those

"who shall intentionally violate any provision of this Act."

Was it not error for the court below to take the question of intent from the jury as it did?

(2) May the United States, through Congress, use her power as a sovereign in enforcing her contract which she made with Ellis, the defendant, for the erection of a public pier, and may she punish a breach of that contract by making it a misdemeanor and a crime; and does not the Act of 1892 and the indictment and conviction of Ellis in this case under the provisions of that Act really amount to that?

(3) May Congress, which has no general criminal jurisdiction nor power to pass police laws, make an Act in itself indifferent, and which in no wise affects the peace and dignity of the United States or its property, a crime—a misdemeanor—and punish it by imprisonment, which it did by the Act of 1892, merely because the United States has power to build a pier, and in so doing, the right to establish by contract the details of the mode of its construction?

(4) Under what grant of power did Congress pass the Act of 1892 compelling Ellis, the defendant, to forcibly prevent laborers on the public pier from work-

ing more than eight hours a day; making it a misdemeanor for him to neglect so to do?

(5) Is not the absolute restriction of the hours of labor to eight by the Act of 1892 in contravention of the liberty of the citizen and therefore a violation of the Fifth Amendment?

(6) Does not the Act of 1892 properly constructed leave a wide discretion to the Navy Department as to what is emergency work within the contracts of that Department, and if that Department contracts without restriction of the hours of labor, as it did with Ellis for the erection within a limited time of a pier, and if that Department permitted men to labor more than eight hours a day on this pier, are not these facts for the jury bearing on the question of an intentional violation of the Act as well as that of extraordinary emergency.

ATKIN VS. KANSAS, 191 U. S., 223.

That case does not rule the present case:

(1) The statutes of Kansas and the Act of 1892 are dissimilar in these respects:

The Act of 1892 makes a violation of its provisions a misdemeanor and a crime:

The Kansas Act did not, though it inflicted punishment for its breach.

The Act of 1892 provides punishment only for an intentional violation of its provisions:

The Kansas Act said nothing about intentional violation.

The Act of 1892 contained no provision reading the terms of the Act into and making it a part of all subsequent contracts:

The Kansas Act did contain substantially such provision.

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(2) The questions raised are different.

In that case there was no question raised as to the *intentional violation* of the Act, nor was it complained that the case had been taken from the jury by the court.

In the present case, that is one of our complaints and that is one of the questions raised.

In that case this court rested its rulings on
"the broad ground that work being of a public nature * * * it is for the state to prescribe the conditions under which it will permit work of that kind to be done."

No question there seems to have been raised as to the power of the state to make the violation of a contract a misdemeanor and a crime, and in this case that question is raised.

In that case the Act was passed by the state having the broad and unlimited police powers to provide for the public health and peace and safety, while in the present case the Act was passed by Congress which has no general police or criminal power, and whose acts must appear to be necessary and appropriate to the exercise of some granted power.

The Kansas Act regulating the hours of labor, regarded aside from its contractural aspects, was a simple police law, while the Act of Congress, so far as the conviction of the defendant in this case is concerned, raises the question of the power of Congress to declare Ellis' act in not preventing the men from working for more than eight hours a day, a misdemeanor and a crime.

That case raised no question as to the construction of the Act of Kansas, while this case raises such question as to the construction of the Act of Congress.

Viewed in the broad light as to whether either the United States or the state can restrict the hours of adult labor to eight hours a day, where the employment does not fall with obnoxious work, the two cases do raise the same question, though the power of Congress to do so does not necessarily follow from such a power in the State.

Argument.

It is not doubted that A, in his contract with B, may provide that B shall not work more than eight hours a day; and if A may do this, it is quite difficult to see why a municipal corporation may not, or a state or the United States. Either one of these, having a job to let, has the liberty of determining the details and the manner in which the work shall be carried on, and the laborer or mechanic may or may not agree to the terms of the contract. If he does agree, he is bound by it. His relations to the employer become contractual, and contractual only: His relations are not that of a subject to a sovereign, but of an equal with an equal, whose relative rights and duties are fixed by the terms of the contract: Such, and such only, were Ellis' relations to the United States for the erection of the pier: He owed the United States no duty as a subject to erect it: His duty arose solely by his contract.

We submit:

(I) The right of the individual to dispose of his labor upon such terms as he deems best, is undoubted, and admitted in *Atkin vs. Kansas,* 191 U. S. 223. If he may dispose of it at all, then the extent of the disposition is a matter optional with himself: The men who worked on the pier did so voluntarily. The sole crime of Ellis was that he did not forcibly restrain them from the work.

(II) The great weight, if not the universal voice of authority, is that an adult may, if he sees fit, engage for what time he sees fit in ordinary employments, not dangerous, hazardous or injurious to life, limb or health, and he has that right, as part of his liberty, the preservation of which was one of the chief features of the Federal Constitution. The Preamble states that in order (amongst other things) to

> "secure the blessings of liberty to ourselves and our posterity"

we do ordain the Constitution, and Article V of the Amendments excepted out of the power delegated by the people to the Congress the power to deprive him of his liberty.

(See the matter fully stated and authorities cited in *Lochner vs. New York,* 198 U. S., 53.)

The laborer can work nowhere unless employed. He works under contract. To take from him one of the places he may work over eight hours, public work, even if the contractor is willing to employ him, deprives him of part of his liberty and is unconstitutional.

See cases collected and commented on:

People vs. Orange Co., 65 L. R. A., 33, 175 N. York, 84.

Articles in Central Law Journal, No. 11, pages 147, 163, 181, 198; No. 58, page 361.

Allgeyer vs. Louisiana, 165 U. S., 578-591.

Holdin vs. Hardy, 169 U. S., 366-391.

Williams vs. Fears, 179 U. S., 270-274.

Butchers' Union vs. Crescent City, 111 U. S., 746-757.

There is no pretence in the present case that the kind of work done was hazardous—or unhealthy—or in any way dangerous to life or limb. It was not of a class with such cases as *Holden vs. Hardy,* 169 U. S., 366.

(III) It is one thing to hold that a state or municipality may by contract restrict the hours of labor, for by entering into the contract each person waives his right to the constitutional protection: It is entirely another thing to make it a crime for a man to insist on his constitutional right to labor more than eight hours a day. If, as we have seen, this is his constitutional right, any statute making it a crime to claim it clearly infringes the Constitution. Nor need the statute wholly deprive him of *all* kinds of labor. If it deprives him of *one* kind of labor to that extent it affects his liberty. If a man may so voluntarily labor, the fact that another does not forcibly prevent him is not a crime, nor can Congress arbitrarily impose on any one a positive duty such as this forcible control and convict him of a crime if he fails to do so.

(IV) The Act of 1892 is constitutional in so far as it prohibits the Departments from contracting for more than eight hours' labor per day on public works, but it is unconstitutional in so far as it makes it a

crime for one who has come into contractual relations with the government for that public work to permit some other man to work more than eight hours per day.

It is not pretended in this case that Ellis did aught else but *permit* two men to work more than eight hours a day. He did not force them to work more than eight hours a day; he owed no duty to the government to enforce its laws as a police officer or a sheriff. His relation to the Government was only and solely contractual so far as the pier was concerned; his contract did not contain any covenant that he was to oversee and prevent men from working on the pier more than eight hours a day, or if it did, if it be said that the Act of 1892 is read into Ellis' contract with the government and made part of it, and Ellis agrees to enforce the Act so far as the pier is concerned, still his relations with the government are contractual and contractual only.

The words of the Act of 1892 are *Require* or *Permit.*

"Require or Permit."

Peckham, J., in *Lochner vs. New York,* 198 U. S., 45, 52, (New York baker law) thus defined them:

> "All the opinions assume that there is no real distinction, so far as this question is concerned, between the words 'required' and permitted.' *The mandate of the statute that 'no employe shall be required or permitted to work,'* is the substantial equivalent of an enactment that *'no employe shall contract or agree to work,'* more than ten hours per day, and as there is no provision for special emergencies the statute is mandatory in all cases. It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer, permitting, under any circumstances, more than ten hours' work to be done in his establishment."

Ellis had no right as a subject to build the pier, and he owed no duty to the government as a subject to build it. His relation then with the government was solely by reason of his contract to build it. The two men who worked on the pier owed no duty to the government to work there, and had no right to work there except by a permission of the government through the contractor. Their relations then to the government were purely contractual. It was not as between sovereign and subject, but as between two parties to a contract. The other party to the contract, either Ellis or the two laborers, has no possible power to enforce it against the United States except the ordinary right of one citizen against another, indeed he is even restricted in that from

his inability to sue the United States. The contract itself gives to the United States as against Ellis and the laborers no other or higher right to enforce its provisions than it gives to either Ellis or the laborers. Its words certainly do not even suggest such an extraordinary power as to enforce its provisions or punish its breach by making it a misdemeanor and a crime, and charging the party with moral turpitude.

It must not be forgotten that this Act of 1892 presupposes the existence of a contract relation between the United States and the contractor who erects the public works. Without the contract, as we have seen, the contractor has no duty or indeed has no right, to erect the works.

The case must not be confused and looked at as though it were a case between the subject and the sovereign, where the sovereign may dictate to the subject and provide that the violation of its dictates is a crime. That right is owing to the peculiar relation between subject and sovereign. It is the fealty of the subject to the sovereign that the subject obeys the sovereign's laws. It is part of the law for the protection of the sovereign that the subject should be punished if he violates the laws, but the idea that the sovereign may enforce its contracts by its sovereign power; may make an indifferent act an immoral and invidious one; may stain with moral turpitude the party who commits the breach, would give to the sovereign unfair and extraordinary remedies in his contract relation with its employees, and would be inconsistent with the theory and practice of our Government.

This Court said in *Robertson vs. Baldwin,* 165 U. S., 275, 281 (p. 281):

> "The breach of a contract for personal service has not, however, been recognized in this country as involving a liability to criminal punishment, except in the case of soldiers, sailors and possibly some others, nor would public opinion tolerate a Statute to that effect."

Mr. Justice Harlan in a dissenting opinion approved this, and said that the notion that

> "the government may make it a criminal offense punishable by fine or imprisonment, or both, for any one to violate his private contract voluntarily made, or to refuse without sufficient reason to perform it * * * is a proposition which cannot, I think, be sustained at this day in this land of freedom."

See:

People vs. Coler, 166 New York, 1-61.
Ex parte Kubach, 85 California, 274.

(V) The question here is not one under the police laws, for the employment does not touch the public health, peace and morals, and the United States has not the power except in a restricted way to pass police laws. The United States has not in that sense the well-being of the people of the States under its charge,

but its police laws must relate to granted power, and be adapted to the enforcement of it.

Cooley's Constitutional Limitations (7th Ed., p. 831.)

Hare's American Constitutional Law, p. 539.

If one engages in the kind of work which the morals or the health of society requires control of, and therefore is under its general supervision, as a part of the police laws, he may be subjected to reasonable restrictions by his state, but unless he falls within that class, he is not subjected to such restrictions, and to attempt to prevent him from working more than eight hours a day is to deprive him of his liberty, even under the State laws.

See cases cited ante.

(VI) The Act of 1892 in question limits and restricts "the service and employment of all laborers and mechanics who are now and may hereafter be employed by the government of the United States, by the District of Columbia or by any contractor or sub-contractor upon any of the public works of the United States or of the said District of Columbia,"

to eight hours in any one calendar day, and makes it unlawful for any officer of the government or contractor or sub-contractor

"whose duty it shall be to employ, direct or control the services of such laborers or mechanics, to require or *permit* any such laborer or mechanic to work more

> than eight hours in any calendar day, except in case of extraordinary emergencies."

It will be noticed that this Act makes it unlawful for any contractor either to

> "require or *permit*"

any laborer to work more than eight hours a day in any calendar day.

Not merely *require*, but *permit*.

That is, in some way the contractor must control, forcibly if necessary or by discharging from his service, any man who wants to work more than eight hours a day and thereby earn more money. This is an added duty which Congress imposed on those who contracted with it, but it is not a duty in the nature of that which the subject owes the sovereign.

Section 2 of this Act provides that whoever

> "shall *intentionally* violate any provision of this Act shall be deemed guilty of a misdemeanor, and for each and every such offense"

may be fined or imprisoned, or both.

While it is admitted that the United States may in its contracts for labor restrict the hours of labor, and whoever contracts with it on that basis is bound by the terms of the contract, yet it is respectfully submitted that the United States when it makes such a contract does so exactly as if it were an individual, and has the same and no other or greater rights to enforce the terms of the contract than would an individual.

In so entering into a contract, as the United States did in this case with Ellis, it waived its right and power as sovereign, and contracted just as an individual.

Having done so, it cannot punish the violation of that contract relation except by the usual and ordinary means that courts of justice afford or that are reserved to individuals, such as the rescission of a contract to enforce its provisions; it cannot hold over its contractor the awful powers of sovereignty in the making of laws, and it cannot make the violation of the terms of the contract a crime and thus attach a moral taint or add an unusual mode of enforcing the terms of contracts. It is not, as the quotations *ante* show, consistent with our system of government, and it is a denial to Ellis of his right to contract, makes Ellis guilty of a crime—of moral terpitude—if he breaks this contract, and is a discrimination against him as well as the imposing of unusual punishment.

When a State enters into business relations and makes contracts with private persons, it waives its sovereignty, and is to be treated as a private person and subjected to the principles of law applicable as between individuals, save only in respect to its immunity from suit.

Pennsylvania vs. Wheeling, &c. Bridge Co., 13 How., 518, 560.

The State of Pennsylvania filed a Bill to enjoin the erection of the bridge across the Ohio River at a point beyond its boundaries. The state proved that it had con-

structed and owned a system of canals and railroads from Philadelphia to Pittsburg and other public works from which it derived a large revenue, which would be lessened by any obstruction to navigation which diverted traffic from its lines of transportation. In sustaining the right of the State to file this Bill, McLean, J., said:

> "In this case, the State of Pennsylvania is not a party in virtue of its sovereignty * * *
>
> "When a State enters into a co-partnership, or becomes a stockholder in a bank, or other corporation, its sovereignty is not involved in the business, but it stands and is treated as other stockholders, or partners. And so in the present case, the rights asserted and relief prayed, are considered as in no respect different from those of an individual."

Darrington vs. The State Bank of Alabama, 13 Howard, 12:

In this case it was held that bills issued by a bank were not "bills of credit" within the constitutional prohibition, although the state owned the entire stock of the bank, the legislature elected the directors, the faith of the state was pledged for the redemption of the bills and they were made receivable in payment of all public dues.
(p. 17):

"The State, as a stockholder, held its property as a corporation or individual could hold it, in the Mobile Bank. The specie in its vaults, notes taken on discounts, and every description of property, managed by the directors of the bank, were subject to judicial process by its creditors. *And in such a procedure the State, in its sovereign capacity, could not interfere. Its powers would be no greater than the powers of individual stockholders of a bank, under similar circumstances.*"

Davis vs. Gray, 16 Wall., 203, 232.

In overruling a demurrer to a bill filed by the receiver of a railroad, to enjoin a land commissioner of the State of Texas from issuing patents of lands previously granted to the railroad, and now sought to be forfeited by the State, the Supreme Court, speaking through Justice Swayne, said: (232):

"When a State becomes a party to a contract, as in the case before us, *the same rules of law are applied to her* as to private persons under like circumstances. *When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty.*"

Bank of the United States vs. Planters' Bank of Georgia, 9 Wheat., 904, 907.

In the opinion by Chief Justice Marshall, it is said: (p. 907):

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, *it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen.*

United States vs. Bank of Metropolis, 15 Pet., 377, 392.

In holding the United States Government liable on a bill of exchange, accepted by its authorized agent, the court said:

(p. 392):

> "When the United States, by its authorized officer, became a party to negotiable paper, they have all the rights, and incur all the responsibility of individuals who are parties to such instruments. We know of no difference, except that the United States cannot be sued."

Suppose Congress had made it a misdemeanor for the acceptor or drawer of the Bill of Exchange to pay it would this Court have upheld such an Act?

Cooke vs. U. S., 91 U. S., 389-396.

> "It was conceded in the argument, that, when the United States become parties to commercial paper, they incur all the responsibilities of private persons under the same circumstances. This is in accordance with the

decisions of this court. *The Floyd Acceptances,* 7 Wall., 557; *United States vs. Bk. of Metropolis,* 15 Pet., 377."

Could Congress make the non payment of a note or check to the U. S. A. a misdemeanor?

(VII) Admitting that under the Federal Constitutional provision Congress may make all laws necessary and proper for carrying into execution the powers, for example, to provide and maintain a Navy, and that the erection of a pier may be regarded as under the power to provide a Navy or under the power to regulate commerce, it is still true that Congress has not the general police power that the different states have. It cannot legislate generally for the health, morals and happiness of the people, but it is restricted in its legislation to the specific things which were delegated to it in the Federal Constitution.

Therefore, in considering whether Congress may pass an Act of the kind of the Act of 1892 and make the performance of labor for more than eight hours a day a crime, and imprison one who, though he does not himself work, fails to prevent others from so doing, the question arises whether, under the Constitutional provision, it is necessary for carrying into execution the powers granted, for example, to provide and maintain a Navy and to regulate commerce, that it should have the power to provide that more than eight hours' labor or the omission to prevent it constitutes a misdemeanor, constitutes a crime importing moral turpitude.

Accepting the definition of the great Chief Justice, that all laws which are appropriate to the end may be passed by Congress, it still leaves open the question whether under the restriction of the preamble and the fifth amendment, Congress may so restrict the liberty of the citizen, inflict

criminal punishment for breach of a contract. Whether the pier is built by men laboring nine hours a day or eight hours a day would seem to be wholly immaterial so far as the power to erect the pier is concerned. There is nothing inherent in the limitations of the work for eight hours a day which in any way enhances or enforces the power to build the pier. With some show of reason it may be said that a state might pass an eight hour labor law under the reasons outlined by Mr. Justice Harlan in *Atkin vs. Kansas,* but such reasons are wholly inapplicable to the legislation like the Act of 1892, and besides Congress does not have the general police power. How can it be fairly urged that the omission of Ellis to prevent two men from working on the pier was an appropriate and necessary act to enforce the power to build the pier?

United States vs. Fox, 95 U. S., 670, 672:

An Act of Congress provided that if any person obtained goods upon false pretenses, and within three months thereafter bankruptcy proceedings were begun with respect to him, he should be punished by imprisonment. The Court held that the Act could not be upheld as legislation necessary and proper to carry into execution the power to establish a system of bankruptcy law, and was therefore unconstitutional.

Mr. Justice Field in the opinion of the Court said:

> "An act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the

jurisdiction of the United States. An Act not having any such relation is one in respect to which the State can alone legislate."

The powers of Congress are limited to those expressly or by necessary implication conferred, and for every act of Congress a warrant must be found in the Constitution.

United States vs. Harris, 106 U. S., 629, 635:

"The government of the United States is one of delegated, limited and enumerated power. *Martin vs. Hunter's Lessee,* 1 Wheat., 304; *McCulloch vs. State of Maryland,* 4 id., 316; *Gibbons vs. Ogden,* 9 id., 1. Therefore every valid act of Congress must find in the Constitution some warrant for its passage. This is apparent by reference to the following provisions of the Constitution: Section 1 of the first article declares that all legislative powers granted by the Constitution shall be vested in the Congress of the United States. Section 8 of the same article enumerates the powers granted to the Congress, and concludes the enumeration with a grant of power 'to make all laws which shall be necessary and proper to carry into execution the foregoing powers and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.' Article X of the

amendments to the Constitution declares that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.'

"Mr. Justice Story, in his *Commentaries on the Constitution,* says: 'Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. *If it be not expressed,* the next inquiry must be whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it.' Section 1234, referring to *Virginia Reports and Resolutions,* January, 1800, pp. 33, 34; *President Monroe's Exposition and Message of May 4, 1822,* p. 47; *1 Tuck. Black Commo. App.,* 287, 288; *5 Marshall's Wash. App.,* Note 3; *1 Hamilton's Works,* 117, 212."

Under the power

"to make all laws which shall be necessary and proper for carrying into execution the foregoing powers,

the legislation sought to be enacted by Congress must be in fact a means appropriate and plainly adapted to a legitimate and constitutional end.

In *McCulloch vs. Maryland,* 4 Wheat., 316.

Chief Justice Marshall laid down the rule for the construction of this clause in the Constitution, and his language has been often repeated, but never departed from by this court.

(p. 421):

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate,* which are *plainly adapted to that end,* which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

And again the Chief Justice states that the power to pass incidental legislation exists.

United States vs. Fisher, 2 Cranch., 358, 396.
Cherokee Nation vs. Kansas Railroad Co., 135 U. S., 641, 657.
Prigg vs. Commonwealth of Penna., 16 Pet., 539, 615.

Hepburn vs. Griswold, 8th Wallace, 603-613-615:

"But the extension of power by implication was regarded with some apprehension by the wise men who framed, and by the intelligent citizens who adopted, the Constitution. This apprehension is manifest in the terms by which the grant of incidental and auxiliary powers is made. All powers of this nature are included

under the description of 'power to make all laws necessary and proper for carrying into execution the powers expressly granted to Congress or vested by the Constitution in the government or in any of its departments or officers.'

"The same apprehension is equally apparent in the tenth article of the amendments, which declares that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or the people.'

"We do not mean to say that either of these constitutional provisions is to be taken as restricting any exercise of power fairly warranted by legitimate derivation from one of the enumerated or express powers. The first was undoubtedly introduced to exclude all doubt in respect to the existence of implied powers; while the words 'necessary and proper' were intended to have a 'sense,' to use the words of Mr. Justice Story, *'at once admonitory and directory,'* and to require that the means used in the execution of an express power *'should be bona fide, appropriate to the end.'* The second provision was intended to have a like admonitory and directory sense, and to restrain the limited government established under the Constitution from the exercise of powers not clearly delegated or derived by just inference from powers so delegated.

"The rule for determining whether a legislative enactment can be supported as an exercise of an implied power was stated by Chief Justice Marshall, speaking for the whole court, in the case of *McCullough vs. The State of Maryland;* and the statement then made has ever since been accepted as a correct exposition of the Constitution. His words were these: 'Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are

plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution are constitutional.' And in another part of the same opinion the practical application of this rule was thus illustrated: 'Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would be the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to affect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and tread on legislative ground.'

"It must be taken then as finally settled, so far as judicial decisions can settle anything, that the words, 'all laws necessary and proper for carrying into execution' powers expressly granted or vested, have, in the Constitution, a sense equivalent to that of the words, laws, not absolutely necessary indeed, but appropriate, *plainly adapted to constitutional* and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to affect objects intrusted to the government."

Legan Tender Cases, 12th Wallace, 543:

"Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful,

or because they make the government stronger. *There must be some relation between the means and the end; some adaptedness or appropriateness of the laws to carry into execution* the powers created by the Constitution."

The purpose of an Eight Hour Law is correctly described by Justice Peckham in the *Lochner case* (198 U. S.) to be

"the state, in enacting the statute, intended to give its sanction to the view held by many, that, all things considered, the general welfare of employes, mechanics and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen and enable them the better to discharge the duties appertaining to citizenship."

If that is the real purpose of the Act of 1892; if it is intended as a health measure—or as promoting the morality of the employees—surely under the above cases Congress had no power to enact it.

If the prohibitory part of this Act of 1892, which forbids men from working over eight hours a day and punishes for its violation by making it a crime, is neither

"necessary or proper,"

nor

"bona fide appropriate to the end,"

nor

"plainly adapted"

to further and carry out directly granted powers of Con-

gress, but is an attempt to pass a so-called police law, it is unconstitutional.

One part of the Act, *i. e.*, providing for employing men to work only 8 hours a day is constitutional. It is a means fairly adapted to the end and one of the details which Congress may dictate.

But making the violation of the contract terms a misdemeanor is neither necessary nor appropriate to the end sought —the construction of the pier.

Authorities.

In the following cases, statutes, some of them quite similar to the statute in question, have been held to be unconstitutional.

By the Supreme Court of New York in *People vs. Orange Co.*, 175 N. Y., 84, where the Chief Justice said (p. 87):

> "It seems to me to be entirely clear that this statute cannot be upheld as an exercise of the police power vested in the Legislature. I think that the proposition is too plain for debate."

That statute provided that if any one required or permitted more than eight hours' work a day, he was guilty of a crime or misdemeanor.

Ryan vs. City of New York, 177 N. Y., 271.

People ex rel. Connessy vs. Grout, 179 N. Y., 117.

See also

In Re Morgan, 26 Colo., 414.

The Supreme Court of Nebraska so held in

Low vs. Reis, 41st Neb., 127.

See Freund on Police Power, Sections 315, 316, 317.

See also the cases cited *ante* from the Supreme Court of the United States opinions.

State of Ohio.

State of Ohio vs. Norton, 5th Ohio, (*Nisi Prius*) 183.

City of Cleveland vs. Construction Company, 67 Ohio, 197.

The Supreme Court of Illinois:

Chicago vs. Hurlburt, 205 Ills., 346, 363.

Fisk vs. the People, 188 Ills., 206, 210.

The State of Washington:

Seattle vs. Smyth, 22 Wash., 227.

The State of California:

Ex parte Kuback, 85th Calif., 284.

State of Indiana:

State vs. Varner Electrical Supply Co., 160 Ind., 338.

DISTINCTIONS BETWEEN THE POLICE LAW AND CRIMINAL LEGISLATION.

See *Freund on Police Powers,* Section 26:

> "There is, however, a difference between police legislation and criminal legislation which is popularly well understood and which is not without legal and constitutional significance. The peculiar province of the criminal law is the punishment of acts intrinsically vicious, evil and condemned by social sentment; the province of the police power is the enforcement of merely conventional restraints, so that in the absence of positive legislative action, there would be no possible offense. The difference here referred to roughly corresponds to that between misdemeanors and felonies or infamous crimes, or perhaps still more to that between *mala prohibta* and *mala in se.*"

In *Wharton on Crimes,* Vol. 1, Section 23a, it is said:

"That there is a distinction in ethics there can be no question, the one case involving, the other not involving, a moral taint.

* * * * * * *

"Police offences * * * are usually not against the material and moral element in the law, but against its formal structure."

POLICE POWER OF CONGRESS.

Matter of Heff, 197, U. S., 488, 505.

Brewer, J., said:

"The general police power is reserved to the States, subject, however, to the limitation that in its exercise the State may not respass upon the rights and powers vested in the General Government.

* * * *

"There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the State or the Nation and not divided between the two."

Leisy vs. Hardin, 135 U. S., 100, 158, Gray, J., dissenting:

"Congress cannot regulate this subject sale of liquor under the police power, because that power has not been conceded to Congress, but remains in the several States. * * *

"The protection of the safety, the health, the morals, the good order and the general welfare of the

people is the chief end of government. *Salus populi suprema lex.* The police power is inherent in the States, reserved to them by the Constitution, and necessary to their existence as organized governments."

Lottery Case, 188 U. S., 321, 365, Fuller, C. J., dissenting:

"To hold that Congress has general police power would be to hold that it may accomplish objects not entrusted to the General Government, and to defeat the operation of the Tenth Amendment, declaring that: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' "

The exercise of police powers pre-supposes the existence of sovereignty. The United States has no general or inherent sovereignty, but such sovereignty as it has is restricted to the exercise of the powers enumerated in the Constitution. It therefore follows that the police power of the United States is similarly restricted.

License Cases, 5 *Howard,* 504, 583.

Passenger Cases, 7 Howard, 424, Justice Wayne:

"Police powers, then, and sovereign powers, are the same, the former being considered so many particular rights under that name or word collectively placed in the hands of the sovereign."

Lake Shore, &c., Ry. vs. Smith, 173 U. S., 684, 689.

Legal Tender Case, 110 U. S., 467, Field, J.:

> "Congress can exercise no power by virtue of any supposed inherent sovereignty in the general government. Indeed, it may be doubted whether the power can be correctly said to appertain to sovereignty in any proper sense as an attribute of an independent political community. * * * there is no such thing as a power of inherent sovereignty in the government of the United States. It is a government of delegated powers, supreme within its prescribed sphere, but powerless outside of it. In this country sovereignty resides in the people, and Congress can exercise no power which they have not, by their Constitution, entrusted to it; all else is withheld."

Downes vs. Bidwell, 182 U. S., 369:

> "The source of national power in this country is the Constitution of the United States; and the government, as to our internal affairs, possesses no inherent sovereign power not derived from that instrument, and inconsistent with its letter and spirit."

Dred Scott vs. Sanford, 19 Howard, 401:

> "This difference arises, as we have said, from the peculiar character of the Government of the United States. For although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess

all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon it; and neither the legislative, executive, nor judicial departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution."

Intent.

The first section of the Act of 1892 does not use the word *intentional,* but merely provides that the service and employment of laborers and mechanics is hereby limited and restricted to eight hours in any one calendar day except in cases of extraordinary emergency.

Section II does use the word *intentional,* and it provides that any contractor

"whose duty it shall be to employ, direct or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia who shall *intentionally* violate any provision of this Act shall be deemed guilty of a misdemeanor."

Here the intent is made a necessary part of the crime. Without the use of the word *intentional* the construction of this section might have been that each person is bound to know the law and his ignorance is no excuse. But here we have the peculiar phrase

"intentionally violate"

How could one *intentionally* violate a law unless he knew of the existence of the law?

It was certainly optional with Congress, if they had the power to pass this Act and impose laws to enforce penalties for its violation, to limit the cases where there should be such punishment to wilful and intentional violation of the Act; and it seems impossble that there could be such wilful and intentional violation without a knowledge on the part of

the defendant of the Act itself, such as would be given by referring to the Act in the contract.

Agreeing that undoubtedly all men are presumed to know the law and ignorance is no excuse, yet Congress may enact a different rule and this we submit is what it did by the Act of 1892.

In addition to that, all the facts hereinafter cited as to the emergency clause, and the fact that the work was done in the presence and with the acquiescence of the engineer of the Navy Department who had charge of it, and that such work was not forbidden, and that the Navy Department made no provision against working more than eight hours a day, considering the reasonable necessity for the completion of the pier and that it was all *rush work* and the men only worked nine hours a day. These and the other facts in the case were all matters for the jury to determine whether there had been an intentional violation of the law. But the learned Judge below disregarded it all and charged the jury on this part of the case as follows:

> "I instructed you that it must be shown that the defendant intentionally required or permitted such mechanic to work more than eight hours in any calendar day during the construction of the work and before the finding of the indictment. It has been admitted by the defendant that he knew that DeGaust and Moore were required and permitted to work more than eight hours on June 13th, the calendar day named in the indictment; and I instruct you, gentlemen, that if all the other elements of the offense are present, *that would be an intentional violation of the statute on the defendant's part.* If the defendant intended to permit these men to work over eight hours on the calendar day named, *then he intended to violate the statute,* and there seems to be thus far no question that the elements to which I have referred already are established here."

In this way the court took from the jury the question of intent and himself decided it as a question of law. In so doing, it is submitted, the court plainly disregarded the rule of law. He should have submitted all the facts in the case to the jury and let the jury decide whether Ellis' intent was to violate the law. The jury might have found that Ellis thought, working under the terms of the contract as it was, and under all the circumstances surrounding him, and working with the acquiescence of the navy officer in charge of the work, that it was the kind of work which was not in violation of the law.

In the *United States vs. Quincy,* 6 Peters, 445, a conviction was reversed because of the refusal of the court to submit the question of intent to the jury. It was said:

> "Intention is a question belonging exclusively to the jury to decide. It is the material point on which the legality or criminality of the act must turn."

Lee vs. Lee, 8 Peters, 20, 24:

> "If intention was at all open for inquiry, it is certainly matter for the jury. In the case of the *United States vs. Quincy,* 6 Peters, 466, this Court said that when the intention with which an act is done becomes a subject of inquiry, it belongs exclusively to the jury to decide."

People vs. Black, 125 N. Y., 334, 335:

The Court of Appeals set aside a conviction of a misdemeanor because the lower court had not submitted the question of intent to the jury.

Andrews, J., said:

"However clear the proof may be, or however incontrovertible may seem to the judge to be inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. * * *

"The presumption that a person intends the ordinary consequences of his acts is, as applied to criminal cases, a rule to aid the jury in reaching a conclusion upon a question of fact, and is not a presumption of law."

Extraordinary Emergency,

Webster defines *emergency,*—sudden or unexpected appearance; unforseen occurrence; a sudden occasion.

Extraordinary he defines as—beyond or out of the common order or method; not usual, customary, regular or ordinary.

Emergency has been commented upon in the *People vs. Lee* Wah., 71 California, 80; and *extraordinary,* in *Moses vs. Insurance Company,* 1st Duerr, 170, and The Titania, 19 F. R. 105, and the two words taken together seem to mean a decidedly unforseen contingency. It need not necessarily be sudden, as we commonly understand by an act of God, nor necessarily overwhelming or threatening overwhelming damage.

The practical construction of a statute by the department is entitled to great weight.

See the cases collected, *Lewis & Sutherland on Statutory Construction,* Section 474 (309).

The contract made by the Government with Ellis for the construction of a pier in the navy yard at Boston (so

far as the record shows) does not refer to this Act of 1892, and contains no covenant as to the number of hours any mechanic or employe might work; it provided that the entire work should be concluded within six months; it defined unavoidable delays as follows (p. 6):

> "Unavoidable delays are such as result from causes which are undoubtedly or may reasonably be presumed to be beyond the control of the contractor, such as acts of Providence, unusual storms, fires (not the result of negligence) fortuitous events,, unavoidable accidents etc.; delay caused by acts of the United States will also be regarded as unavoidable delays."

The piling of this pier was to be constructed of sound, straight, long leaf yellow pine, not less than eight inches in diameter at the point and 12 inches in diameter at a point 5 feet from the butt.

The testimony was (p. 13) that there had been delays in obtaining the piles which were not anticipated; Ellis found that he could not obtain the long leaf piles, that nobody would guarantee to furnish them anywhere near a reasonable time. This information was given to the United States as soon as received, and the United States, after waiting awhile, decided in January to allow him to substitute short leaf piles for the long leaf pine piles. Ellis at once made a contract for these, and the party agreed to supply them within sixty days, but he failed to do so, and the piles themselves were not delivered until June, 1906, after repeated efforts by Ellis to hurry them up.

There was also unexpected difficulty in obtaining the white oak piles, and all of this delayed the work, so that on June 13th, Ellis was pushing the work to completion as rapidly as he could, and it was then that the men worked overtime voluntarily so worked (p. 13).

Under the contract, the United States, by its officer in charge, had full control and direction of the work (p. 5),

and Mr. Thompson, the Navy Engineer in charge of the work (p. 7), testified that he did have such charge, and that he knew that men were working on the pier nine hours a day on June 13th (p. 9). He said that the Navy Yard was the home of the North Atlantic Squadron, and that he knew that Ellis was using every effort to complete the pier, including work overtime, and on page 12 he says:

> "I should say that the construction of the pier was reasonably necessary for the safe docking of ships, the safe and economical docking of ships."

Considering the form of the contract and its omission to refer to the Act of 1892,—its omission to restrict the hours of labor,—its time limit,—and the fact of its construction of unavoidable delays,—that the officer of the Navy was himself in charge and control of the work, and that he knew that, there having been unexpected delays in the procuration of the piles for the construction of the piers, Ellis was working overtime to complete the contract, and this without objection by the naval officer himself,—it would be a fair inference that the Navy Department construed this work of Ellis on June 13th as being within a fair definition of the words *extraordinary emergency* in the Act of 1892, even if the construction were not broader, and that is, that the Navy Department did not think work of this character was within the terms of the Act of 1892, but all constituted emergency work.

All these things being true, it is submitted that the learned judge below erred when he charged that, under all the evidence, there was no case of extraordinary emergency present.

APPENDIX.

Act of Aug. 1, 1892, c 352, U. S. Comp. Stat., p. 2521.

CHAP. 352. An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia.

Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, OR by any contractor or sub-contractor upon any of the public works of the United States or of the said District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government or of the District of Columbia or any such CONTRACTOR or SUB-CONTRACTOR whose duty it shall be to employ, direct or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency.

Sec. 2. That any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or sub-contractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia who shall intentionally violate any pro-

vision of this act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall upon conviction be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

Sec. 3. The provisions of this act shall not be so construed as to in any manner apply to or affect contractors or sub-contractors, or to limit the hours of daily service of laborers or mechanics engaged upon the public works of the United States or of the District of Columbia for which contracts have been entered into prior to the passage of this act.

Approved August 1, 1892.

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CLERK

Nos. 567, 664, 665, 666, 667, 668, and 669.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

WILLIAM H. ELLIS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

EASTERN DREDGING COMPANY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

BAY STATE DREDGING COMPANY
v.
THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

WILLIAM H. ELLIS, PLAINTIFF IN error, *v.* THE UNITED STATES.	No. 567.
EASTERN DREDGING COMPANY, plaintiff in error, *v.* THE UNITED STATES.	Nos. 664, 665, 666.
BAY STATE DREDGING COMPANY, plaintiff in error, *v.* THE UNITED STATES.	Nos. 667, 668, 669.

MOTION TO ADVANCE.

The Attorney-General, on behalf of the United States, respectfully moves the court to advance the above-entitled causes on the docket for hearing during the pending term as one case, for the following reasons:

1. The causes present for consideration four questions arising under the Federal eight-hour law, appended hereto (27 Stat., 340):

(*a*) The constitutionality of the act;

(*b*) The application of the law to dredging work;

(*c*) The meaning of the words "laborers and mechanics," in their application to employees upon dredging vessels;

(*d*) The meaning of the exception "in case of extraordinary emergency."

The constitutional question seems to be disposed of by the case of *Atkin* v. *Kansas* (191 U. S., 207); and the other questions involved, although subject to controversy, are not regarded as difficult and will probably not require extended discussion.

2. The War Department, as appears by the letter appended hereto, is charged with the duty of making contracts involving the payment of about $87,000,000, under the recent river and harbor act; it is in doubt as to the proper construction of the eight-hour law; and it apprehends that bidders will submit their estimates upon the theory that the law applies to dredging work, thereby greatly diminishing the value which the Government could receive under said appropriation if the law should be held inapplicable to such work. The Secretary of War is withholding advertisements for proposals for this work, pending the disposition of this motion.

3. Through various sources the attention of the Government has been called to several hundred instances of alleged violations of this law in dredging work, and it desires to obtain an authoritative decision before incurring the great expense of trying the alleged violators; and it is apprehended, furthermore,

that the courts, so long as these cases remain undecided, will direct that any prosecutions that may be attempted be continued until a final decision is announced by this court.

4. The defendants in these causes are desirous to be informed of their rights and duties at as early an opportunity as possible, and it may be affirmed safely that all contractors engaged upon public works of the United States are particularly anxious for the same result.

5. With the exception of the constitutional question—decided upon a State statute involving a principle similar to that of the Federal statute, in the case above referred to—the questions presented have never been decided by this court, and there is very little authority in the decisions of the lower courts or in the opinions of the Attorneys-General to guide the Executive Departments in enforcing, or the various persons amenable to its provisions in determining, the proper construction of this law.

6. There is a very general public interest in the matter.

Opposing counsel concur in this motion.

CHARLES J. BONAPARTE,
Attorney-General.

APPENDIX.

CHAP. 352. An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or of the said District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government or of the District of Columbia or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency.

SEC. 2. That any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall upon conviction be punished by a fine not to exceed one thousand

dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

SEC. 3. The provisions of this act shall not be so construed as to in any manner apply to or affect contractors or subcontractors, or to limit the hours of daily service of laborers or mechanics engaged upon the public works of the United States or of the District of Columbia for which contracts have been entered into prior to the passage of this act.

Approved, August 1, 1892.

12112 W. D. JBH

WAR DEPARTMENT,
Washington, February 28, 1907.

SIR: 1. With reference to the importance, from the point of view of this Department, of a speedy decision by the United States Supreme Court of one or more of the cases arising under the national eight-hour law which, it is understood, have reached or soon will reach that court, I have the honor to submit the following statement of facts:

2. On July 14, 1906, by the authority of the President, it was ordered "that it is the duty of the officers of the War Department, in respect to Government contracts which are performed under their supervision, and for the performance of which they are responsible, to use the powers they have to prevent violations of the law, and especially the Federal law, by contractors for the work which comes under their supervision," and that those powers should be actively employed, which was followed by an Executive order dated September 19, 1906, to the same effect. Prior to that time it had been held by the War Department that officials representing the Department who enter into contracts on behalf of the United States are not

charged with the duty of enforcing the law with reference to those with whom they contract, the latter being directly responsible in the matter. In an opinion of Attorney-General Miller (20 Opin. Atty. Gen., 459) it was also held that certain employees of the United States, the nature of whose employment is peculiar, might well be held to be, as a matter of fact, neither laborers nor mechanics within the meaning of the eight-hour law, such as sailors or others on shipboard, or teamsters. This ruling was interpreted by this Department to include engineers, firemen, seamen (embracing dredge employees), watchmen, messengers, teamsters, etc.

3. Since the issuance of the above-mentioned Executive order, and because the interpretation above referred to was questioned in certain cases, attempts to readjust the classification of employees in the Department at large under the law have, in view of the somewhat meager legal decisions, been extremely difficult, especially in the case of dredge employees. It is very desirable that the embarrassment of the Department in this respect be relieved at the earliest date practicable by a decision of the Supreme Court as to the application of the statute to the various classes of employees, private and public.

4. What is regarded, however, as the most urgent reason for an early decision of the questions involved in the enforcement of the eight-hour law is the matter of the additional expense to the United States resulting from an illiberal interpretation and enforcement of the law, not only because of the necessity for the employment of more men where the Government is doing its own work, but on account of the increased prices for contract work let subsequent to the Executive order of September 19, 1906.

5. *One of the classes of Government work which forms a large proportion of that which is intrusted by Congress to the War Department for execution is the improvement of rivers and harbors, which involves principally dredging operations and lock and dam construction. The question of whether the law applies to dredging operations, as above stated, is very much in doubt, and is one which, in the interests of the United States, should be settled before the work directed by the new river and harbor act is advertised. This act appropriates and authorizes approximately $87,000,000, of which about 80 per cent is covered by the continuing-contract method. Continuing contracts are usually made effective until the projected works are completed, requiring from two to ten or more years. In view of the uncertainty as to the applicability of the eight-hour law to so large a proportion of river and harbor work, and to the great saving to the Government through the increased purchasing power of the money appropriated if it should be held that the law does not apply to dredging operations, it is greatly desired that the decision of the Supreme Court in the cases before it be handed down at an early date.*

6. *The matter is considered to be so important that it is my purpose, if the court will advance the date of hearing and indicate its intention to render its decision before the adjournment of the present term, to withhold advertisement of the work covered by the new river and harbor act, so far as it can be safely done (at least that portion under the continuing-contract system), until the decision is known.*

Very respectfully,

WM. H. TAFT,
Secretary of War.

The honorable the ATTORNEY-GENERAL.

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BRIEF FOR THE UNITED STATES.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Ellis *v.* The United States, No. 567.

October 13, 1905, Ellis entered into a contract with the United States which provided that he should "provide, furnish, and deliver, at his own risk and expense, at the United States Navy-Yard,

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Boston, Mass., all the necessary materials, labor, tools, and appliances for the construction of a pile and timber pier, to be known as Pier No. 2, at said navy-yard," according to plans and specifications made a part of the contract, for a certain sum named. (Record, 5.) He was to commence work immediately after the execution of the contract and to complete the pier within six months (Record, 5), but for unavoidable delays—which were defined to be those caused by acts of the United States or such as result from causes which reasonably may be presumed to be beyond the control of the contractor, as acts of Providence, unusual storms, fires (not the result of negligence), fortuitous events, etc.—extensions of time might be made. (Record, 6.) Work was duly begun, but the pier was not completed until the week ending October 13, 1906. (Record, 7.) An extension of time was requested (Record, 14), but whether it was granted or not does not appear.

At the Boston Navy-Yard there are two dry docks—dry dock No. 1, to which this pier was attached, and another which was finished in 1905. (Record, 7.) Dock No. 1 was completed in 1835; has been in use ever since, and until 1903, when pier No. 1 was completed, had no approaches. (Record, 7.) Pier No. 2 constitutes a second approach to it. Dry docks are sometimes built, as was this one, without approaches, sometimes with one and sometimes with two. (Record, 8.) These piers or wharves or approaches constitute exten-

sions of the sides of the dock running out 150, 200 or more feet; and they serve a double purpose: They afford additional wharfage facilities in the Yard for furnishing ships with supplies and they make the docking of the ships easier, more economical of time and money, and safer. (Record, 8, 9.) When a dock has one or more of these approaches a ship is docked as follows: Awaiting proper tidal conditions, it is moored alongside the pier or wharf and great ropes are attached to its sides, which are passed around belaying pins on the piers; at the favorable moment the caisson of the dock is removed, the dock is flooded, men pull on the ropes, and the vessel moves steadily and evenly into the dock. (Record, 8, 10.)

In September, 1906, Ellis was indicted in four counts for violations of the act of August 1, 1892, chapter 352 (27 Stat., 340), commonly known as the eight-hour law. The first count charged, in substance, that Ellis was a contractor on a public work of the United States, namely, the construction of said pier, on June 13, 1906; that it was his duty to employ laborers and mechanics upon it; and that as a contractor he intentionally required and permitted, upon said day, a certain mechanic in his employ upon said work to labor more than eight hours, there being no extraordinary emergency. (Record, 2.) The second count was like the first except that a different mechanic was named. (Record, 3.) After plea of not guilty a verdict of guilty was returned upon the first two

counts, the third and fourth having been nol prossed with the defendant's consent. (Record, 4.) He was sentenced to pay fines of $250 on each count (Record, 25, 26), and thereafter this writ of error was allowed. (Record, 31.)

The defendant admitted most of the essential averments of the indictment and mainly sought to show that the overtime employment of these mechanics was excused by the presence of an extraordinary emergency upon the following evidence: 1. The Boston Navy-Yard and the one at Portsmouth, N. H., the former preferably, are the places where injured war vessels of the United States composing the North Atlantic Squadron would be brought for repairs. (Record, 11.) The construction of the pier makes the docking of vessels for repairs safer. (Record, 9.) Since 1836 ships have been safely docked without any approaches to this dock (Record, 12, 7); and about fifty were safely docked while there was but one approach. (Record, 8, 7.) There is no evidence of an injury to a vessel at this dock. The construction of this dock was not essential or necessary to the safety of the vessels; it was desirable merely. (Record, 11.) It would not make safer human life or limb. (Record, 11.) 2. The contract called for 311 long-leaf pine piles, and 17 more were found to be requisite (Record, 13), and 366 white-oak piles. (Record, 7.) The former kind could not be obtained from large dealers (Record, 13), and permission was given to substi-

tute short-leaf. (Record, 14.) No attempt was made to get the long-leaf variety from small dealers. (Record, 16.) There was great difficulty in getting the white-oak piles, as the contract required those of "freak" dimensions. (Record, 14, 16.) The defendant submitted his bid after conference with a civil engineer and contractor of great experience (Record, 13, 14), both of whom understood the number, dimensions, and quality of the piles to be provided, had bought piles before, and acknowledged that it was a part of their business to be familiar with the pile market. (Record, 15.) They realized that there was a chance that they might not get what they wanted promptly. (Record, 15, 16.)

The only substantial error alleged, beyond the failure to charge that the facts showed an extraordinary emergency, is that the eight-hour law is unconstitutional. (Record, 17, 26.) A number of other errors are assigned, but they are of such a character that it is probable that they will not be pressed.

Eastern Dredging Co. *v.* The United States, Nos. 664, 665, 666.

Bay State Dredging Co. *v.* The United States, Nos. 667, 668, 669.

These cases were six informations, filed at the December term, 1906, charging in appropriate terms violations of the act of August 1, 1892, chapter 352 (27 Stat., 340), commonly known as the eight-hour law. In Nos. 664, 665, and 666 it

was alleged, in substance, that the Eastern Dredging Company was a corporation, duly organized and having a usual place of business at Boston, Mass., on November 26, 1906; that it was a contractor whose duty it was to employ laborers and mechanics on one of the public works of the United States, namely, dredging a portion of the 35-foot channel of Boston Harbor known as section 4 of division 4, and that as a contractor it intentionally required and permitted the laborers and mechanics named to work for more than eight hours on said day, there being no extraordinary emergency. (Record, 664, 2, 3; 665, 2, 3; 666, 2, 3, 4.) The same allegations were made as to the Bay State Dredging Company, except that the violations are charged upon November 30, 1906, and the alleged public work was the dredging of Chelsea Creek in Boston Harbor. (Record, 667, 2, 3; 668, 2, 3; 669, 2, 3.) To each information motions to quash were filed and overruled, and, after pleas of not guilty, verdicts of guilty were returned upon all counts except the third count in No. 668, which was nol prossed with the consent of the defendant. (Record, 664, 5; 665, 5; 666, 5, 6; 667, 5; 668, 5; 669, 5.) Upon each information fines of $50 were imposed and thereafter these writs of error were allowed. (Record, 664, 33; 665, 12, 13; 666, 15; 667, 47; 668, 7; 669, 7.)

The assignments of error make these principal points: (1) The eight-hour law is unconstitutional; (2) the work upon which the defendants

were engaged was not "public works of the United States;" (3) the employees named were not laborers or mechanics; (4) there was an extraordinary emergency. Other errors are assigned, but it is not necessary to refer particularly to them here.

No. 664 alleged that deck hands and a crane tender's helper were laborers; No. 665, that the dredge captain, cranesman, or crane tender, as he is also called, and the fireman on the dredge were laborers; No. 666, that the master, mate, and fireman of the tug, and the scowman of the scow, were laborers, and that the engineer of the tug was a mechanic. Nos. 667, 668, and 669 make the same allegations, and, in addition, charge that the engineer and firemen of the dredge are mechanics.

Before stating the material facts bearing upon the question as to which of these employees, if any, are laborers or mechanics, descriptions of the dredge, scow, and tug, and of a dredging operation, will be given.

DESCRIPTION OF DREDGE, SCOW, AND TUG.

The dredge's hull is rectangular in shape, flat-bottomed and square-sided, built with unusual strength to stand the extreme strain to which it must be put. It is afloat while working and is held in place by four piles called "spuds," one at each of its four corners. Its forward part is occupied by the engines, with necessary boilers, that operate the scoop or dredging bucket, control the spuds, and furnish all necessary power. The hull supports an A frame, pivoted near the center and extending

over the bow of the hull. In the bow there is an arm projecting upward and outward, known as a "boom," its bottom end being pivoted to a turntable set in the forward end of the dredge connected with the engine, so that a lateral and, by chains passed over the A frame, an up-and-down movement may be given to the boom. At the end of this boom, by devices not necessary to be described, is fixed the bucket, swung on a pivot so that it may move up and down and forward and back. All the movements of the bucket are governed and controlled by machinery operated by levers, which movements are determined by the dredge captain, with a single exception: The movement of the bucket up and down the boom is determined by the cranesman. The bottom of the bucket is hinged and is known as the "door." It has a catch attached to a rope operated by the cranesman, who pulls the rope to open the door. A dredge can move itself for short distances slowly by putting its bucket down in the mud ahead and then pulling it up by means of chains attached to the bucket. Except for locomotion in this method the dredge must be towed from place to place and from port to port. (Record, 667, 21, 22; 664, 15.)

The scows are square-sided, oblong in shape, containing compartments known as "pockets," adapted to receive the dredged material, with bottoms which open to dump it. They are flat-bottomed and have no keel, flashboards, rudder, or steering apparatus of any kind. (Record, 667, 20.)

The tugs are the familiar towboats operated by steam.

DREDGING OPERATION.

In the ordinary performance of dredging contracts—and these contracts were performed in the ordinary manner—the company's fleet, consisting of the dredge, scows, and towboats or tugboats, is towed by the latter from port to port outside the headlands, having on board its crew. (Record, 664, 15.) When the location of the work is reached, the engine which moves the crane or boom is started, the spuds are let down, the crane and its bucket, which is the implement which scoops the mud and other material from the bottom, goes down and comes up full; the cranesman or cranes tender and his helper guide the bucket over one of the attendant scows and by means of a line empty it. (Record, 665, 6.) The bucket is lifted up and down by machinery connected with the main engine, all worked by steam. The machinery which operates the bucket has levers which make the bucket go up and down and swing over the scows. The dredge captain handles these levers and works them with his hands (Record, 665, 6); there is an engineer who tends the main engine, having under him an assistant, known as an oiler, who spells him as occasion may require, and one or more firemen (Record, 664, 10); upon the dredge there are several deck hands who wind up the scows, tend the lines, make the scows fast and cast

them off, who work with their hands entirely, and do anything which the dredge captain orders (Record, 664, 9); upon the scow is an employee known as a scowman, who shovels the mud off the sides of the scow while it is alongside the dredge and keeps it clean (Record, 666, 8); when a scow is full one of the tugboats takes it in tow so as to reach the dumping ground at low water, and the scowman assists in the towing; when the dumping ground is reached the several pockets of the scow are opened by the scowman and he sees that the material, which often sticks in the pockets, is dumped (Record, 666, 8); the crew of the tugboats consists of a captain, a mate, an engineer, and fireman; and besides towing the scows to the dumping ground, the tugs shift the position of the scows about the dredge, and bring from the shore supplies for the dredge; they are required to be in readiness at all times for services that may be required. At the completion of the day's work, which is generally planned to last eleven or twelve hours, it is the duty of the crew of the dredge and of the scowman to clean up and make all snug for the night, and to set the lights on the dredge and on the scow required by law. The watchman of the dredge has charge during the night of any scows that may be moored near by. (Record, 664, 11.)

It appears that the crew of the dredge are paid by the month and are fed and provided with rooms on the dredge. (Record, 667, 18; 664, 13.) Sometimes one or more of the scows is provided with

rooms, and when this is the case the scowmen live on board and cook their own meals; otherwise they live on board the dredge and are fed there and are paid by the month. The dredge captain has general charge over the dredging operation and directs the movements of the scows and the tugs, except that the master of the tug may refuse to tow a scow to the dumping ground if he considers the weather conditions to be unfavorable. (Record, 667, 11; 664, 11.) As stated above, the dredge captain, besides his supervisory duties, actually handles the levers which direct the movement of the boom or crane to which the bucket is attached. (Record, 667, 11; 665, 6.) The cranesman is charged with the duty of seeing that the bucket is properly pushed into the earth or mud in such a way that a full load may be removed and not so hard as to cause the machinery to break. It is his duty to govern the depth to which the bucket is allowed to sink before it commences to dredge, gauging the depth by a standard scale or tide board placed on some near-by object. When the required depth is reached he presses a lever which stops the further descent of the bucket and retains the pressure until the bucket has been drawn up after the completion of its cut. He assists in guiding the bucket over the scow and pulls the rope which opens the door of the bucket and empties it. His helper assists him in the performance of these duties. The crane tenders assist about the deck when the dredge is not working. They are called

upon for general duties in case of a breakdown. Their duty is to tend the crane by which the scoops or buckets are operated and to do such other work around the vessel as they may be called upon to do. (Record, 667, 12; 664, 9, 10.)

The deck hands do whatever work about the deck the captain directs. They are not expected to possess the ability to direct other men. They handle the lines, clean the decks, attend to lights, and do other work of a similar nature. (Record, 667, 12, 24; 664, 11, 12.) The engineer of the dredge is said to have the same duties as an engineer on any vessel. He attends to the engine all the time and has under him an assistant engineer, called an oiler, who spells him from time to time, and also one or more firemen. (Record, 664, 10.) The duties of the firemen are to keep up steam and feed the fires. In No. 667 it is said that the firemen upon the dredge there was really an engineer. It was his duty to attend to the fires and keep up the steam properly, and also, as engineer, to take charge of the engines on the dredge, all of which he was to keep oiled and in operative condition. He made the necessary repairs on them. Firemen on dredges are recruited from firemen on towboats and other vessels. (Record, 667, 12.) The masters and engineers of dredges are not licensed by the United States authorities, but the masters and engineers of the tugs are all licensed by the United States. (Record, 664, 15.) The duty of the scowman is to shovel the mud away from the sides of

the scow while the dredged material is being dumped into it and to keep the scows clean. After the scow has been filled with dredged material it is towed by one of the tugs to the dumping ground. The scow having no rudder is steered by the motion of the towboat and by the manner in which the scowman from time to time changes the position of the towlines—lengthening and shortening them. Upon arriving at the dumping ground he opens the pockets and sees that the dredged material, which often sticks to the pockets, is completely dumped, and then he assists in the management of the scow, as above indicated, on the return trip to the dredge. (Record, 667, 20–21; 664, 8.)

The mate of the dredge has general charge and control of its deck and must be able to fasten, handle, and care for lines so as to locate the scows that they may be in position to receive the material removed without undue damage to the dredge. He must be able to care for, splice, and generally handle the hawsers and lines, and be able to direct deck hands. He directs the fastening and handling of the lines. Primarily he performs no part of this work with his own hands, that being the business of the deck hands, although he sometimes assists. (Record, 667, 12.)

The duties of the engineer and firemen upon the tugs are similar to those upon the dredges. The captain of the tug must know the harbor and river upon which he is working and in general be able to navigate his vessel. He must be licensed

by the local inspectors under the United States statutes as a pilot. He decides when the conditions of the weather are proper or not, as the case may be, to make a trip to the sea dump. He must further have the special knowledge and ability to successfully tow scows, which is stated to require a skill not ordinarily possessed by captains of ordinary boat-towing tugs. (Record, 667, 13, 19; 666, 8–10.) There is evidence that all of the crew of the dredge, including the scowman and the dredge captain, perform manual labor (Record, 664, 16); and that it is desirable and perhaps essential that the crew of the dredge and the scowmen should have seafaring knowledge in order to meet weather conditions that may arise at any time, and that it is the practice to recruit the crews for dredges from the merchant marine. (Record, 667, 19.)

In these cases it is admitted that these defendants were working under contracts with the United States and that they knew that the employees named worked more than eight hours.

The places where the defendants were working were not owned by and had never been ceded to the United States, and were not under its control except so far as the navigable waters in Boston Harbor are under its control. The waters upon which the defendants were working are navigable waters. (Record, 667, 27, 28; 664, 15.)

NATIONAL EIGHT-HOUR LAW LEGISLATION.

Act of August 1, 1892 (27 Stat. 340):

CHAP. 352. An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or of the said District of Columbia is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government or of the District of Columbia or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency.

SEC. 2. That any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia, who shall intentionally violate any provision of this act, shall be deemed

guilty of a misdemeanor, and for each and every such offense shall upon conviction be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

SEC. 3. The provisions of this act shall not be so construed as to in any manner apply to or affect contractors or subcontractors, or to limit the hours of daily service of laborers or mechanics engaged upon the public works of the United States or of the District of Columbia for which contracts have been entered into prior to the passage of this act.

Approved, August 1, 1892.

Revised Statutes, section 3738, act of June 25, 1868 (15 Stat., 77):

SEC. 3738. Eight hours shall constitute a day's work for all laborers, workmen, and mechanics who may be employed by or on behalf of the Government of the United States.

Act of March 30, 1888, chapter 47 (25 Stat., 57):

And the Public Printer is hereby directed to rigidly enforce the provisions of the eight-hour law in the department under his charge.

Act of January 12, 1895, chapter 23, section 47 (28 Stat., 607):

SEC. 47. The Public Printer shall cause work to be done on the public printing in

the Government Printing Office at night as well as through the day when the exigencies of the public service require it, but the provisions of the existing eight-hour law shall apply.

By special acts eight hours constitutes a day's work for letter carriers.

Act of May 24, 1888, chapter 308 (25 Stat., 157).

Act of June 2, 1900, chapter 613, section 1 (31 Stat., 257).

ARGUMENT.

THE EIGHT-HOUR LAW CONSTITUTIONAL.

The first Federal eight-hour law was enacted in 1868 (act June 25, 1868, chapter 72, 15 Stat., 77, now Rev. Stats., sec. 3738, ante page 16). This statute was twice before this court, but in neither case was it necessary to pass upon its validity.

United States v. *Martin*, 94 U. S., 400.

United States v. *Driscoll*, 96 U. S., 421.

In those cases the statute was considered as "in the nature of a direction from a principal to his agent, that eight hours is deemed to be a proper length of time for a day's labor, and that his contracts shall be based upon that theory. It is a matter between the principal and his agent, in which a third party has no interest." Therefore, contracts fixing a different length of time are legal and binding. (Martin's case, at page 404.) And the statute does not apply to the employees of an

independent contractor. (Driscoll's case, at pages 423, 424.)

In consequence of the interpretation of the law given in those cases, and because of the absence of a penal provision, the act of August 1, 1892, chapter 352 (27 Stat., 340), was passed, preserving the principle of the prior law, to insure its effective execution.

The validity of neither statute has ever been questioned in the courts or by executive officers.

United States v. *Ollinger*, 55 Fed. Rep., 959.

United States v. *Jefferson*, 60 Fed. Rep., 736.

United States v. *John Kelso Company*, 86 Fed. Rep., 304.

United States v. *San Francisco Bridge Company*, 88 Fed Rep., 891.

12 Opin. A. G., 530; 13 ib., 29; ib., 424; 14 ib., 37; ib., 128; 16 ib., 58; 17 ib., 341; 18 ib., 389; these opinions being upon the act of 1868. The foregoing decisions and the following opinions being upon the act of 1892: 20 Opin. A. G., 445; ib., 454; ib., 459; ib., 487; ib., 500; 21 ib., 32; 25 ib., 441; ib., 465; 26 ib., 1; ib., 30; ib., 36; ib., 64.

In 25 Opin. A. G., 441, Mr. Justice Moody, then the Attorney-General, had occasion to consider whether the act of 1892 applied to the employment of laborers and mechanics in the construction of the Panama Canal; and in coming to the conclusion

that it did, in answer to an objection that his construction gave the law an operation beyond the territorial jurisdiction of the United States, he said (p. 444):

> But although Congress has no power to enact laws which shall operate beyond the jurisdiction of the United States, still it has the power to determine what shall be the length of a day's work of any and all persons employed by the Government or by contractors upon any public works undertaken by the United States anywhere. Congress may, if it chooses, fix the hours of labor on the work of the United States wherever it is conducted and make the law binding on the officers of the United States and, through the agency of a contract, upon contractors with the United States. In other words, it may direct the action of its own officers and agents and dictate the terms of the contracts made with the Government. The law thus becomes operative everywhere, not because it operates over territory beyond the jurisdiction of Congress, but because Congress has full jurisdiction over the officers and agents of the United States and full authority to prescribe the terms of any contract which shall be entered into by the United States.

That opinion has been sustained and affirmed by acts of Congress. (Act February 27, 1906, chapter 510, 34 Stat., 33; act June 30, 1906, 34 Stat., 669.) It expresses precisely the theory upon which

Congress enacted this law—that the Government has the same right that any employer of labor has to dictate the terms upon which its work shall be conducted. (See the Senate and House reports on this act, Appendix, pp. 45, 48, and the debates, Cong. Rec., vol. 23, pp. 451, 452, 5723, et seq.)

It will be observed that the law is not of general application: Congress has not attempted to prescribe the hours of labor to be observed by contractors generally; it only applies to the officers of the United States and of the District of Columbia, and to those who enter into contracts for the performance of labor upon the public works of the United States or the District of Columbia. For this reason we need not consider the class of cases of which *Lochner* v. *New York* (198 U. S., 53) is a type.

Furthermore, the statute (section 3) excepts from its operation contracts entered into before the passage of the law, so, if that would be otherwise an objection of which these appellants could avail themselves, it can not be urged here.

The question is, then, whether the Government as an employer may require, under penalty, its officers and its contractors, who have engaged themselves upon its public works, to see that the workmen under their charge or in their employ shall not be required or permitted to work over eight hours or any number of hours or minutes in a calendar day.

The contention is that this act curtails the lib-

erty of both the workman and the contractor; and the fifth amendment is invoked as forbidding such legislation.

It provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

The fourteenth amendment is in the same words, and under that amendment a State law embodying a principle precisely like that contained in the national law has been sustained, over dissent by three members of the court, none of whom gave the reasons therefor.

Atkin *v.* Kansas, 191 U. S., 207, controlling.

Atkin, who had entered into a contract with the city of Kansas to do all the labor and furnish all the materials for the construction of a brick pavement in that city, was found guilty of a violation of the State eight-hour law, having required and permitted one of his laborers to work ten hours on a certain day, and brought his case to this court, where he made the following objections to the statute:

(1) It deprives a contractor of his liberty and his property without due process of law; (2) it is class legislation; (3) it encroaches upon the right of the employer and the employee to contract as they see fit; (4) it is not a valid exercise of the police power. There was one other objection, based upon the fact that the law applied to contractors

with municipal corporations, which need not be mentioned.

From a consideration of the State statute, which is set out in 191 U. S., at pages 207 et seq., it appears that it prescribed the hours of work for laborers, workmen, and mechanics employed by the State or any governmental subdivision thereof, such as counties, cities, and townships, directly, or indirectly through the interposition of a contract. By the second section it was made unlawful for any contractor for the performance of any work or the furnishing of any material manufactured in the State, for the State or any of the divisions thereof named, to require or permit the classes of employees named to work more than eight hours in a calendar day, except in certain cases enumerated; and by the third section officers of the State or any division thereof and contractors were subjected to penalties, fine or imprisonment, or both, for failure to observe the law's command. This statute was enacted one year before the national statute, was referred to in the debate (Cong. Rec., vol. 23, p. 5731), and is so like it that it must be supposed that the Congress used it as a model.

The conviction of the appellant was sustained and each of his contentions was overruled. The basis of the decision was thus stated (p. 224):

> We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the State and its municipal agents acting by its authority, it is for the State to prescribe the

conditions under which it will permit work of that kind to be done. Its action touching such a matter is final, so long as it does not, by its regulations, infringe the personal rights of others, and that has not been done.

The phrase "public works of the United States" includes the work upon which appellants were engaged.

The very work upon which the Eastern and Bay State Dredging companies were engaged was authorized by statutes entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," which enacted "That the following sums of money be, and are hereby, appropriated * * * for the construction, etc., of the public works hereinafter named:" * * *

> Improving harbor at Boston, Massachusetts: For maintenance and general improvement, one hundred thousand dollars.
>
> For improving said harbor in accordance with the report submitted in House Document numbered one hundred and nineteen, Fifty-sixth Congress, second session, by providing channels thirty-five feet deep, * * * six hundred thousand dollars.
>
> (Act of June 13, 1902, chapter 1079, 32 Stat., 331, 332.)
>
> Improving harbor at Boston, Massachusetts: Continuing improvement and for maintenance, one hundred thousand dollars.
>
> (Act of March 3, 1905, chapter 1482, 33 Stat., 1118.)

The work upon which Ellis was engaged was authorized by act of March 3, 1905, chapter 1481 (33 Stat., 1092, 1101), entitled "An act making appropriations for the naval service," etc., under subhead "PUBLIC WORKS, BUREAU OF YARDS AND DOCKS," as follows:

> NAVY - YARD, BOSTON, MASSACHUSETTS: * * * approach to dry dock numbered one, forty-three thousand one hundred dollars; * * *

And, both before and after the passage of the act of 1892, works of a character like those upon which each of the appellants was engaged have been denominated "public works."

> 20 Stat., 152; ib., 363; 21 Stat., 8, 180, 468; 22 Stat., 191; 24 Stat., 581, 584; ib., 310; 25 Stat., 400, 462, 813; 26 Stat., 193, 426, 803; 27 Stat., 88, 240, 721; 28 Stat., 130, 831; 29 Stat., 202, 367, 654; 30 Stat., 377, 1030, 1121; 31 Stat., 692, 1116; 32 Stat., 331; 33 Stat., 333, 1101, 1117.

In *United States* v. *Jefferson* (60 Fed. Rep., 736) it was held that the removal of obstructions to navigation was public works within the act of 1892; and in *United States* v. *San Francisco Bridge Company* (88 Fed., 304) it was held that it is immaterial that a violation of that act is committed upon territory over which a State has political jurisdiction, if the public work is lawfully being constructed thereon for the United States.

In 26 Opin. A. G., 30, 34, it was said that dredg-

ing, and the mere deepening of a channel, is public works, because "the paramount control by the United States over the marine belt, harbor areas, and navigable waters is akin, in the interest created and in its permanence and completeness, to a title to real estate and ownership of fixed structures."

A similar intimation is contained in 23 Opin. A. G., 174, 176, to which reference is made in 26 Opin, supra, 32.

The suggestion that the works upon which the Bay State and the Eastern Dredging companies were engaged were not public works, within the law, because they were conducted upon land within the territorial limits of a State, not owned by the United States, in view of the definition of public works which Congress itself has long declared, and of the foregoing authorities, is not sound, and can not be maintained.

It was work for which the Congress could lawfully appropriate money, and it is competent to the Congress to define by certain enactments, even later in date than other acts, the words and phrases used in the other acts. (*Johnson* v. *The Southern Pacific Company*, 196 U. S., 1, 21, and cases cited.)

The exception "in case of extraordinary emergency" only applies to sudden, unexpected happenings, not of the customary, usual, or regular kind, demanding prompt action to avert imminent danger to life, limb, health, or property.

The appellant, Ellis, rests his appeal largely upon the proposition that an emergency situation existed

at the time he worked his laborers more than eight hours. He contends that the dry dock, although not in an extremely dangerous condition, was so constructed that a possibility of danger to a battle ship in the operation of warping it into the dock for repairs existed; that the extension of one of the dock's sides, the approach which he was constructing, was designed to remove and would remove that scintilla of danger; and that, because the fleets of the United States are frequently in the waters near the public work upon which he was engaged and are liable at any time to need the services of this dock, his work was emergency work within the exception to the law. Analyzed, this contention affirms that there may be such a situation as a continuing extraordinary emergency, one which is ever present. He contends, also, that, as he was delayed in obtaining necessary material and might have become liable to pay certain damages stipulated in the contract for failure to complete the work within the time specified, he was justified in working men over time.

In the Century Dictionary the words "extraordinary" and "emergency" are thus defined:

> Extraordinary. 1. Being beyond or out of the common order or rule; not of the usual, customary, or regular kind; not ordinary.
>
> 2. Not pertaining to a regular system or sequence; exceptional; special.
>
> 4. Exceeding the common degree or meas-

ure; hence, remarkable; uncommon; rare; wonderful.

Emergency. 2. A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances.

3. A sudden or unexpected occasion for action; exigency; pressing necessity.

To the same effect are the definitions in the following:

Standard Dictionary, Funk and Wagnalls Company; Webster; Worcester.

Throughout all these definitions there runs the idea of suddenness; by itself alone the word "emergency" indicates that the situation must present itself so quickly that prompt and immediate action is called for, and when to this word is joined another of the most emphatic words in the language it is clear that the Congress not only did not intend to make the exception broad, but did intend to make it extremely or extraordinarily narrow.

The definition given by the judge in the court below in the Ellis case (Record, 567, p. 25) is in accord with the dictionary definitions, and it has received the approval of Mr. Justice Moody, when Attorney-General, and of the present Secretary of War, as appears by the official orders appended to this brief, pages 68, 71, 73.

It was reaffirmed by Judge Dodge in the cases against the two dredging companies (Record, 667,

39; 664, 26) and was adopted by Judge Thompson in the case of *The United States* v. *The Sheridan Kirk Contract Company* (149 Fed. Rep., 809, 813, et seq.), Advance Parts, No. 3, now pending in this court, but not advanced to be heard with these cases.

The view which we take of the meaning of this phrase is confirmed by an expression of opinion in the debates.

It was said (Cong. Rec., vol. 23, p. 5729):

> * * * in each case it is a question of fact for the jury to determine whether there was an "extraordinary emergency" or not. In any given case they may have to decide whether the clouds that arose in the west and the thunder and the lightning indicated a storm or whether they did not. If the storm blew over and the work upon which the men were engaged was not injured, then the case was not a case of extraordinary emergency, and the contractor or Government officer is to be convicted and sent to the penitentiary for six months.

And in other places it is intimated that if there are conditions of haste or exigencies of mere time or business risks well understood by the contractor when he made his contract the intent is that he must overcome them by the employment of two or more eight-hour shifts. (Cong. Rec., vol. 23, pp. 5724, 5728.)

As Judge Thompson pointed out, the phrase "a continuing extraordinary emergency" is self-con-

tradictory. (149 Fed. Rep., supra, at p. 816.) An emergency is an occasion for prompt action, and an extraordinary emergency is an unusual, rare, uncommon event, occurring only at intervals. In Ellis's case it appears that he worked his men overtime upon the anticipation of events which he conceived as likely to happen—that a war ship might be in the waters near the dock and sustain an injury requiring the service of the dock and that he might possibly incur a pecuniary loss—but it does not appear that his anticipations were realized. Urgent situations which can be foreseen in time to avoid the necessity of overtime work must be guarded against solely by putting additional shifts at work. If his theory of the meaning of the emergency clause be adopted, it will practically repeal the statute, for it is conceivable that an occasion may arise at any time requiring a battle ship to enter any navigable stream upon which dredging work is being done; that war may break out, necessitating the immediate use of any dock or fortification under construction; that floods may come to demolish a dam; that the condition of the labor and material markets may cause delay; but the mere fact that such conceptions may occur to the mind or that the latter is realized do not authorize overtime work.

One of the purposes of the statute was thus stated in the Senate report, infra, page 47:

> The American people desire that all classes of society composing the Republic shall be

> educated; that those who labor shall not only be well fed and clothed, but shall enjoy some of the luxuries that make life worth living.
>
> It is only by conferring such benefits that men become more ambitious for themselves, but interested in the welfare and prosperity of the nation.

And from the House report, infra, page 48, it appears very clearly that this act was designed to secure better citizens by promoting the educational, social, and moral elevation of the industrial classes. And the debates are to the same effect. (Cong. Rec., vol. 23, pp. 5724 et seq.; Appendix, vol. 23, pp. 452 et seq.)

To discover the evil which a statute is designed to remedy, the court will read committee reports and the debates to know the situation as it existed and was pressed upon the attention of the Congress.

> *United States* v. *Union Pacific Railroad*, 91 U. S., 72, 79.
>
> *Church of the Holy Trinity* v. *United States*, 143 U. S., 457.
>
> *United States* v. *Laws*, 163 U. S., 258.
>
> *American Net and Twine Company* v. *Worthington*, 141 U. S., 468.
>
> *Dunlap* v. *United States*, 173 U. S., 65.

In view, therefore, of the helpful purpose of this act, both to the Government and to the industrial classes, the exception in it should be confined within the narrowest bounds which the words used permit; and giving to those words their ordinary

meaning, as defined above, it must be concluded that Ellis has not brought himself within them. The cases of the two dredging companies are *a fortiori;* and, indeed, they only faintly suggest that their cases may be brought within the emergency exception.

Attention should be called, however, to one case, the only one which has been found where the emergency exception in an eight-hour law has been before a court for consideration, for it has been thought to be opposed to the conclusion to which we have come as to the meaning of the exception in the national law. (*People* v. *Waring*, 64 N. Y. Suppl., 865; reported also 52 App. Div. N. Y., 36, 1900.)

A State law, applying to the city of Olean, made eight hours the length of a legal day's work, except "in cases of extraordinary emergency caused by fire, flood, or danger to life or property." That city, it appeared, received its water supply from the action of a single pump, which had to be operated continuously to meet the demands of its inhabitants. Its continuous use made accidents to it, which would have produced a water famine, extremely likely, and, accordingly, the water commissioners entered into a contract for the installation of an additional pump, under which the city was to do the excavating necessary for its reception, and from June to November, 1899, a laborer was employed by them in making the excavation. Under these circumstances and upon this evidence

a proceeding was had before the authorities of the city with a view to have the commissioners removed for a violation of the eight-hour law, and for other acts done in disregard, as it was claimed, of other duties incumbent upon them. This proceeding resulted in the exoneration of the commissioners, and a writ of certiorari was obtained to review the action of the city authorities. The case presented to the court, therefore, was not one which called for the expression of an opinion whether or not the commissioners had been guilty of a technical violation of the law; it was not a criminal prosecution, but one which merely required a determination whether the city authorities had failed grossly in their duty by not removing them. After alluding to the facts above stated, and concluding from them that it was clearly the duty of the commissioners to take extraordinary precautions, it was said:

> * * * inasmuch as it is not pretended that they willfully or intentionally violated the law, we think the case, so far as this particular feature of it is concerned, may be dismissed without further comment.

In other words, the court considered that there might have been a technical violation of the law, but that if there had been it was not sufficiently grave so that it could be said that the offenders should be deprived of their offices in consequence of it. However, if that view of this case be not correct, it is submitted that it should not be fol-

lowed in construing the national law, for the reasons above given.

The application of the words "laborers and mechanics" to employees engaged in ordinary dredging operations upon the ordinary nonseagoing dredge and attendant scows and tugs.

The act of 1868 contained, in addition to the words "laborers and mechanics," the word "workmen," but as that is merely a generic term, expressing nothing beyond the other words, it was rejected as superfluous when the act of 1892 was adopted.

We are to consider how far the terms "laborers and mechanics" are applicable to the following employees engaged in an ordinary dredging operation: Captain, mate, engineer, fireman, cranesman, cranesman's helper, and deck hands of the dredge; captain, mate, engineer, and fireman of the tug which tows the scows to the dumping ground; and the scowman, who assists in the management of the scow on its trips and assists in receiving the dredged material and in its deposit at the dumping ground.

1. The term "laborers and mechanics" applies to all who come within the ordinary meaning of those words, irrespective of the manner in which they are paid.

In 12 Opin. A. G., 530, 533, Attorney-General Evarts stated that "The plain import of the law is that a laborer, workman, or mechanic in the em-

ploy of the Government, whether hired by the day, week, or month, shall only be required to work eight hours a day to earn his daily, weekly, or monthly wages, whatever these may be." However, in 14 Opin. A. G., 128, Acting Attorney-General Hill, without noticing the opinion of Mr. Evarts, and after saying that the act should receive a "broad and liberal construction," said that it was "limited to employees who are paid a day's wages for a day's work;" but in 18 Opin. A. G., 389, 391, in stating the effect to be given to that opinion, it was said cautiously that "All persons who are employed and paid by the day are included within the act * * *." In view of the practice of the Government not to pay daily wages, but to pay each month or week, and to the absurd results of such a construction, it is impossible to suppose that the act of 1892 only applies to and benefits those who are employed and paid by the day. Such a construction would enable the purpose of the act to be defeated by any contractor by employing and paying his employees by the week or month.

No decision of a State court defining these words in this connection has been found except *Billinsley* v. *Marshall County* (5 Kan. App., 435), where it was held that a person who contracted, under the Kansas act, which was considered in *Atkin* v. *Kansas* (191 U. S., 207), with a county to do certain work for a monthly sum could not recover a greater sum than that agreed upon, there

being no emergency, by showing that in the performance of his contract more than eight hours work a day was required of him. Beyond the requirements of the case it was said (p. 436):

> The writer is of opinion that the law in question applies only to people who work by the day, and not to those making contracts of a certain amount of work for so much money.

That was the obiter opinion of a single judge; and it is impossible to believe that a like construction will be given to this law. If that view be taken, then in truth this so-called law is no law at all.

The opinions of the Attorney-General on the act of 1892 have followed the opinion of Attorney-General Evarts.

In 25 Opin. A. G., 465, Attorney-General (now Mr. Justice) Moody held that the act applies to all those paid by the year, month, or day, who are in fact laborers and mechanics.

The act of 1892, therefore, applies to any who come within the ordinary meaning of the words used, irrespective of the manner in which they are paid.

2. *The ordinary meaning of the terms "laborer and mechanics."*

There have been few instances in which the meaning of these words in the act of 1892 has been determined.

In *United States* v. *Jefferson* (60 Fed. Rep., 736), which was an indictment against the master of a Government snag boat engaged in removing obstructions to navigation for requiring laborers to work more than eight hours in violation of the law, the alleged laborers were the crew of the boat, and the jury were charged that deck hands and seamen, while engaged in the work of removing the obstructions, were laborers.

In *United States* v. *Martin* (94 U. S., 200) it was assumed that a fireman at the steam boilers at the Naval Academy, Annapolis, was a "laborer, workman, or mechanic" within the act of 1868.

In 26 Opin. A. G., 64, it was held that firemen, blacksmiths and their helpers, and pumpmen employed on irrigation works for the reclamation of arid lands are laborers or mechanics, within the act of 1892.

Locomotive engineers have been held to be mechanics under statutes giving laborers and mechanics the advantage of mechanics' liens, or exemption from garnishment proceedings, or some similar preference.

Sanner v. *Shivers*, 76 Ga., 335 (1886).
State, ex rel. I. X. L. Grocery Company, v. *Land*, 108 La., 512.

A fireman or stoker on board ship is clearly a laborer, and it so has been held. (*Wilson* v. *Zulueta*, 14 Q. B., 405, 1849.)

The application of the act of 1892 to the Government Printing Office is a further proof that it ap-

plies to those, like engineers and firemen, who are engaged in work upon machines and engines. (Act of January 12, 1895, chapter 23, section 47 (28 Stat., 607), ante, pp. 16, 17.)

From the foregoing authorities it seems clear that deck hands, scowmen, cranesmen and their helpers, and firemen, who perform manual labor, and engineers, who perform mechanical labor, are within the ordinary meaning of the term "laborers and mechanics." It appears also, upon the facts stated in the record, that the dredge captain performed manual labor in tending the engine which raises and lowers the shovel, and therefore it seems that it was unlawful to require or permit him to serve more than eight hours on the day named, as the verdict establishes. But it is said that the persons named are sailors, employed on shipboard; that their employment is peculiar; that they do not come within the ordinary definitions; and that this has been the construction placed upon the act by the War Department.

3. *The employees named are not seamen.*

We are informed that there are two distinct types of dredges in use: Self-propelling seagoing vessels, equipped with suction pumps and bins for retaining dredged material, which slowly move up and down the channel, sucking into the bins the mud which is later dumped at the place of deposit, and the ordinary dredge, which is not self-propelling, which must be towed about from

place to place, and which remains stationary during its operations. It is with the latter class that we have to do here.

A dredge and scows have been held to be vessels, and therefore not subject to duty under a tariff act, but that decision rests upon the definition of the word "vessel" in Revised Statutes, section 3, under which any water craft used, or capable of being used, for transportation is a vessel. (*The International*, 89 Fed. Rep., 484.) Before the general definition was made it is quite clear that such craft would not have been considered as vessels for the reason that they are not self-propelling.

United States v. *The Ohio*, 27 Fed. Cas., No. 15915.

United States v. *The Pennsylvania Canal Boat*, 27 Fed. Cas., No. 16027.

A dredge fixed in its place and operating in deepening a channel is exactly like a steam shovel operating upon an excavation on land. The crew of the dredge while it is at work and while they are assisting in its operations are no more seamen than the men who operate a land steam shovel. If their employment can be said to be peculiar, it is only while the dredge is proceeding from one port to another.

A consideration of the reasons for the enactment of the national eight-hour law confirms this view.

4. *Evil designed to be remedied by the eight-hour law.*

In the committee reports (infra, pp. 47, 54) reference is made to the great advance and development of labor-saving machinery during the thirty years preceding 1892. It is said that, by reason of these mechanical inventions of American genius, the labor market had become congested, and that there was not sufficient remunerative employment for all who were willing to labor. That was the situation as it existed, and was pressed upon Congress. (*United States* v. *Union Pacific Railroad*, 91 U. S., 72, 79.) From the debates and from the definitions of "public works," as shown, supra, page 24, it clearly appears that Congress intended this law to apply to dredging operations; hence, taking into consideration that fact and the evil which the statute was designed to cure, there is no difficulty in determining that those who are engaged upon the labor-saving device called a dredge, who come within the ordinary definition of "laborers and mechanics," must not be permitted or required, upon ordinary occasions, to work overtime. And it is just as important that the engineer, his fireman, the deck hand, the cranesman and his helper, and the scowman should have time to be with their families, to educate themselves for the duties of citizenship, as any other of the industrial or laboring classes, as the committee reports denominate them, and it is essential that they should not be worked so

long as to prevent their trade associates from finding employment in the trades which they have learned.

5. *Executive interpretation of the eight-hour law.*

Before considering the action of the War Department we submit that the meaning of the act, its application to dredging operations and to the crews and engineers engaged thereon, is so plain that the doctrine that weight is to be given to the executive interpretation of statutes can not be invoked. "A custom of the Department, however long continued by successive officers, must yield to the positive language of the statute." (*Houghton* v. *Payne*, 194 U. S., 88, 100.)

But it can not be shown that there has been any settled construction by the War Department. Since the passage of the act of August 13, 1894 (28 Stat., 278), requiring contractors upon the public works to give bond for the protection of persons furnishing materials and labor, it has required bonds to be given by contractors upon dredging operations. (See Appendix, p. 63.) It has been the practice, down to July, 1906, for the Government to work the crews of its dredges more than eight hours; but there has been no authority for this course. In none of the orders which the War Department has issued—and the substance of all of them, so far as material, is in the Appendix, pages 67–84—can there be found the slightest authority for that action, except the

Army regulation (infra, p. 67), which, as shown hereafter, is based upon an erroneous interpretation of an opinion of Attorney-General Miller. The eight-hour day is now being observed upon dredges, so far as deck hands, foremen, machinists, blacksmiths, and ordinary laborers are concerned. The law is held not to apply to masters, pilots, steam engineers, enginemen, stokers, stewards, cooks, waiters, and the like, "whose work is not continuous, and who may be called upon at any or occasionally at all hours of the day to perform work." (See Appendix, p. 63.) In the circulars and memoranda, at pages 68–84, it will be seen that the view now taken by the Department is that the crew of a Government dredge of the class under consideration in these cases is within the eight-hour law. There is not, therefore, at the present time any executive action which is opposed to the view which we take of the proper construction of this law, except that the master of the dredge and the engineer and fireman are not regarded as laborers and mechanics—and that decision may be justified because of methods of work which are different from those employed by contractors, although this is mere surmise—and the opposing policy which formerly prevailed has been repudiated.

Finally, it is to be noted that the action of the Department has been based entirely upon an opinion of Attorney-General Miller, 20 Opin. A. G., 459 (Appendix, p. 64), and upon what we believe to be an erroneous construction of that opinion.

The question submitted by the Secretary of War was: Does the eight-hour law include teamsters, watchmen, engineers, and firemen employed in the public service of the War Department, and all engineers, firemen, deck hands, mates, and seamen on Government vessels in the service thereof? Upon what kind of vessels, whether dredges or what we ordinarily mean by the term vessel, was not disclosed. And properly, therefore, the Attorney-General said that he could not answer the questions, for they depended upon statements of fact not made. And then he said (p. 463):

> If the employees named are ordinary laborers or mechanics, working for the Government for wages under ordinary conditions, the statute would seem to apply. At the same time, it is quite apparent that * * * as to others, as, for instance, sailors or others on shipboard, or teamsters, their employment being peculiar, they might well be held to be, as a matter of fact, neither laborers nor mechanics within the meaning of this law.

As has been shown there is no warrant for saying that a dredge, while engaged upon the actual work, is a vessel, or that the crew are "sailors on shipboard."

We submit that upon the facts stated in these records the enginers, firemen, deck hands, cranesmen, and helpers, scowmen, and dredge master, are laborers or mechanics within the law; that the ordinary definition of the term includes them com-

prehensively and completely; and that the executive action, now abandoned or at least not completely insisted upon, can not control the plain meaning of unambiguous words.

The statute was expected to lend an impetus to similar legislation by the States. It is a part of the world-wide movement for shorter hours of labor. It should receive a liberal interpretation that it may accomplish the good and destroy the evil for which it was passed. There are particular reasons why the crews of dredges, living a secluded, tiresome life, should receive the advantages of the liberal educational spirit pervading this statute. The dredging operations are, for the most part, conducted near shore, and there are to be found libraries and society, from which under the present system, whereby their lives are passed almost entirely on the dredge, they are debarred. It is not enough to say that they have exercised a free choice in the method and manner of their work—that may or may not be always the fact—for the Government is interested and has required that they have the time and opportunity to become better fitted to solve the questions which the people themselves are called upon to solve under our system of Government.

CHARLES J. BONAPARTE,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.
OTIS J. CARLTON,
Special Assistant to the Attorney-General.

APPENDIX.

(1)

IN THE SENATE OF THE UNITED STATES.

JULY 16, 1892.—Ordered to be printed.

Mr. CAREY, from the Committee on Education and Labor, submitted the following

REPORT:

(To accompany H. R. 8537.)

The Committee on Education and Labor, to which was referred the bill (H. R. 8537) entitled "A bill relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," having had the same under consideration, recommend its passage.

The bill, if it becomes a law, will be, in effect, an amendment of the existing eight-hour law, which provides (sec. 3738, U. S. Rev. Stats.) "that eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed, or who may hereafter be employed, by or on behalf of the Government of the United States."

It is claimed by the labor organizations of the country and by individual laborers, workmen, and

mechanics that have from time to time been em ployed on behalf of the Government of the United States that the violation of the eight-hour law by the officers of the United States has been quite as common as its enforcement; that in many instances those employed by the Government have been compelled to work ten hours a day and have been paid the same compensation as those who were only required to labor eight hours a day on similar work. The debates that took place in the two branches of Congress show that it was the intention of Congress that the law should be effective.

The bill under consideration, it is believed, contains provisions which will compel its enforcement. It will in effect extend the provisions of the existing law to those employed by the District of Columbia and to any contractor or subcontractor upon any of the public works of the United States or of the public works of the District of Columbia. It affixes a penalty for any violation of the law. It makes it unlawful for any officer of the United States Government or of the District of Columbia or any contractor or subcontractor upon any of the public works of the United States to require or permit any laborer or mechanic to work more than eight hours on any calendar day, except in cases of extraordinary emergency. It excepts from its provisions all contractors or subcontractors that have contracts upon the public works of the United States that were entered into prior to the passage of this act.

The existing eight-hour law now upon the statute books was enacted twenty-four years ago. It should have been enforced. The preponderance of testimony that has been given from time to time

establishes the fact that the law, if observed, is a good one. It is a question whether men working at hard labor eight hours each day do not accomplish in a year as much as those who are compelled to labor ten hours on each working day. The inventions and improvements in machinery, which enable men to do a far greater amount of work in a given time than under old methods, suggests the wisdom of a change in our customs that will shorten the number of hours now devoted each day to manual labor.

The American people desire that all classes of society composing the Republic shall be educated; that those who labor shall not only be well fed and clothed but shall enjoy some of the luxuries that make life worth living.

It is only by conferring such benefits that men become more ambitious for themselves, but interested in the welfare and prosperity of the nation. The United States to-day is looked upon as the workingman's paradise. No other country has so zealously protected the laboring classes in the enjoyment of their rights. In return the workman and mechanic have contributed to the development of our vast resources and wealth, and to the marvelous invention of machinery we owe the increased power of man to do the work of the world. In view of such achievements, who shall say that the laborer, workman, and mechanic is not entitled to share in the benefits that have been conferred in a great measure through his efforts?

The committee believe the bill if passed will afford an opportunity to fully test the eight-hour law.

(2)

HOURS OF LABOR FOR MECHANICS AND LABORERS.

MAY 3, 1892.—Referred to the House Calendar and ordered to be printed.

Mr. TARSNEY, from the Committee on Labor, submitted the following

REPORT:

(To accompany H. R. 8537.)

The Committee on Labor, to whom was referred sundry bills of the House, namely, H. R. 257, H. R. 276, and H. R. 442, respectfully submit the following:

The tenor and purpose of all of said bills was to establish and secure a limitation of the hours of daily service of laborers and mechanics engaged in the service of the United States and of the District of Columbia to eight hours in any one calendar day.

The principle embraced in these measures and in the substitute herewith submitted is not new nor without the sanction of precedent. The authority of the Government by law to regulate and limit the hours of service of those in the immediate and direct employment of the Government is undisputed, nor is it contended that no authority exists in the Government that may be exercised to restrict and limit the hours that laborers may be employed upon the works of the Government under the employment of contractors for the doing of such works.

Among the many industrial problems which challenge the notice and thought of the age, none

attract more universal attention or deserve greater consideration than that which involves the necessity for and practicability of legislation interfering with and restricting the rights of the citizen in relation to contracts for employment and looking thereby to an enforced shortening of the hours of daily toil.

The educational, social, and moral elevation of the industrial classes being involved in this problem, its importance commands not only the interest and attention of such classes, but consideration by the best professional thought of the world. Its agitation in the centuries which have passed since mankind emerged from the semibarbarism of the feudal ages has resulted in shortening for the wage-worker his hours of daily toil by nearly one-half, and no argument is required to demonstrate that universal good has resulted therefrom. The conditions that have long made this a commanding question in European countries and which have resulted in the almost universal organization of the industrial classes of those countries into guilds and trade and labor unions, with the view of obtaining through the coercive force of such organizations that redress of grievances and amelioration of conditions which the citizen of this Republic should be taught to seek to obtain only by the force and sanction of public law, have but recently begun to develop in this country and to assume proportions demanding legislative action.

The changes in the industrial conditions of the United States during the past quarter of a century amount almost to a revolution and have been so rapid that those who recognize and acknowledge such changes scarcely realize the causes which have

produced the same, much less to crystallize public thought upon measures for the redress or alleviation of the evils resulting therefrom.

But little more than thirty years ago this country was new and practically undeveloped. The implements of industry were crude and little effective. Muscular power was, in the main, the force relied upon to move the industries of the country. By comparison labor was plentiful and laborers scarce. Whether in the mill, at the factory, or upon the farm, whoever sought, with willingness and capacity to labor, could find employment. Involuntary idleness was then unknown. Idleness *per se* was then a crime. The word "tramp" was then unread in our language, and no statute to punish alike under that designation the unfortunate deserving with the viciously criminal idlers had yet blackened the legislative records of any State in the Union. "Slums," "sweating systems," "contract labor," now familiar words and designations marking and expressing existing social and industrial conditions, had not then been imported from Europe. The age of cheap and rapid trans-Atlantic transportation had not yet come to annihilate time and distance and place us at the gateways of exit for the overcrowded and discontented millions of the East. But suddenly, so suddenly as to be scarcely perceived and as yet scarcely realized, all these conditions have been radically changed.

The civil war came and transferred hundreds of thousands of our citizens from the fields of labor to the field of arms, increasing temporarily the productive requirements while decreasing the productive energies of the country. Prices and wages were thereby stimulated and hundred of thousands

of European laborers, induced by these conditions, left their native lands and came here to fill the vacuum in our labor field. The wages paid by the country to its common soldiery, $16 a month, with rations and clothing, besides the bounties paid by municipalities, States, and the General Government, aggregating from $200 to $1,200, for an indefinite period of service, brought other hundreds of thousands of laborers from Europe to enter our armies; but the war closed in 1865, and although the productive requirements of the country were thereby greatly diminished, the millions of men who had been engaged in war were suddenly thrown back into the field of industrial competition. Nor did the tide of European labor immigration, begun and stimulated by the war, cease or diminish with the close of the war. New causes and inducements for its continuance were found or offered.

During this period several corporations were chartered for the purpose of constructing our great transcontinental lines of railway. To aid in such construction the Government granted to these corporations vast tracts of the undeveloped and unoccupied public domain. The corporations to which such grants were made, desiring to realize as soon as possible thereon, sent into every part of continental Europe their agents equipped with the most lurid descriptions of these lands and their productiveness and offered the most alluring terms to those who could be induced to become purchasers or settlers thereon. The agents of States and Territories having unoccupied lands followed throughout Europe in the wake of the agents of the railroads, offering like inducements to immigrants.

Thus again were tens and hundreds of thousands of immigrants induced to cross the ocean, many of whom stopped in the industrial centers of the country, and many more, after reaching their promised land, finding that too able literary talent had been employed in writing the prospectuses, returned to the marts of labor and became competitors in the overcrowded fields of toil.

Again, a revenue system constructed in time of war to meet the exigencies of war has been continued, and the great burdens imposed upon imports of foreign manufacture or production is maintained to encourage domestic production. The arguments urged in the maintenance of this system are, that by shutting out or impeding the importation of foreign commodities the domestic producer of such commodities is enabled to dispose of his products at greater profit, which profit he shares with his employees by the payment of higher wages; that therefore the main purpose in the maintenance of this policy is to protect American laborers by securing to them higher wages. That this is the policy of the Government, and that such results are obtained, has been everywhere and upon every occasion advertised to the world, and has resulted in greatly adding to our labor population by immigration from foreign countries. Not only has this been the result of such policy, but the beneficiaries of the system, instead of dividing their profits with their workmen as increased wages, have imported large numbers of foreign workmen under what was known as the contract labor system; which system now being prohibited by law, they are now employing large numbers of foreign immigrants under what is known as the "sweating system" to per-

form the work that American laborers have been compelled to abandon, or from which they have been locked out because they would not submit to reduction of wages, or would not or could not compete with such foreign laborers.

The real result of the system has been that American labor has been practically expelled from the protected industries, and the spectacle has often been presented of the strong arm of the military power of the State being raised to keep away American laborers from American labor. Side by side and hand in hand with the facts and conditions already recited, during this period there has developed a still more potent agency to cause congestion in the market for labor.

The past thirty years have witnessed a greater development of inventive genius and mechanical science in the production of labor-saving machinery than many centuries in any other period of the world's history. Measures have already been suggested and recommended by this committee looking to the ascertainment and publication of information and data showing the relative productive power of machinery and muscular force as now employed in the production of domestic manufactures, and calling for estimates as to the capacity of machinery in man power used in such production, and showing the increase or decrease in the creative cost of products due either to a lack or surplus of labor, or to the introduction of machinery in its manufacture. Such information, when obtained, we believe will be useful in the solution of many industrial problems, as well as the one now under consideration.

The contention is not made here that the volume

of labor has not also increased, or that a considerable percentage of the increase of the industrial energy of the country has not been absorbed in new and increased industries, and by the development and expansion of agricultural, commercial, and mineral resources.

In the period stated there has been a wonderful growth, development, and expansion of all these labor-absorbing agencies, but the contention is that the increase of muscular and mechanical force has been so much greater than the increased demand therefor that it has already produced acute congestion in the markets for labor; that there is not sufficient remunerative labor in the country for all who are willing to labor; that there is much enforced idleness, and that existing conditions are producing and must produce among the laboring classes of the country a spirit of dangerous discontent.

To demonstrate the propositions here stated we need only to reflect that scarcely five years since States, Territories, railroad corporations, and industrial concerns had agents and solicitors abroad in every European labor center, inviting and soliciting immigration of foreign laborers, while to-day the most difficult problem with which the people and the Government have to contend is how to prevent or check what has become an undesirable immigration and an unwanted increase of the labor population.

It is believed that if the principle embraced in the measure herewith presented was made of universal application it would be productive of much good in relieving, at least to a considerable degree, from the results of the conditions stated.

It may well be contended that if in any given community there be but sufficient labor to furnish remunerative employment for 1,000 men working a given number of hours each day, that if in such community there be 1,500 men with families dependent upon them for support, if 1,000 of these be permitted to absorb the whole of such labor and the remuneration therefor, the remaining 500 must remain in enforced idleness, and they and their families must perish or be supported by the 1,000 either as paupers or criminals. If this proposition be true, then as you enlarge the community until it embraces the whole country, maintaining the same relative relation of laborers to employment, you but augment the evils of the conditions by an enlargement of the area wherein such conditions exist. Men will live and must be supported while they live, whether they labor or remain idle, and the burden of the support of those who are idle, while voluntary or involuntary, must be borne by those who labor. True, the almshouse and prison are maintained by taxation levied upon the wealth of the country owned by the employing class; but this burden, borne by them in the first instance, enters as an element into the fixing of the wages of their employees and is thus thrown back upon those who labor.

The basis of agitation in movements looking to shortening the daily hours of service of those engaged in fatiguing physical labor are, first, to give needed opportunity for physical recuperation; second, to afford such laborer opportunity for the enjoyment of the society of his family and for social and intellectual improvement; third, in an overcrowded or congested labor market by expand-

ing the opportunities for obtaining employment, giving a more general and more equitable diffusion to the wage product of the labor of such market. The latter of these, by reason of the always overcrowded conditions of European population, has there been the commanding proposition in such movements, while in this country until recently the two former have been most urged, because of the fact that until recently the conditions upon which the latter is based have not existed in this country. That such conditions now exist your committee firmly believe, and that the universal application of the principle of the measure here presented would in its effects afford relief from such conditions and redound to the general good we entertain no doubt. That there is a widespread sentiment and popular demand for the passage of the proposed measure the records and files of this House amply attest.

While this report is being penned hundreds of thousands of American workmen in the great centers of industry are making public demonstration in favor of its principle, and as evidence of a demand for its enactment writers of eminence favor its adoption and attest their belief in its wisdom and in the necessity for its practical enforcement. Officers of the Government (as will be shown later) declare that its enforcement is practical and that such enforcement would not be prejudicial to the proper conduct of the Government's works. One eminent officer of the Government in the investigation of this subject authorized by the House by this committee under oath testified:

"The practicability of it (the measure here reported) is beyond question. As to the benefits

to labor, if you do it, it is beyond question, it would be the best thing that could be done. If you consider that it would have an influence to make labor eight hours everywhere, it would be a very great benefit."

The same eminent officer (Commodore Folger) declares his judgment that under an eight-hour system the labor product would be better than under the present system. Upon the same investigation he testified as follows:

"So far as the work rendered to the Government is concerned, my opinion is that the labor product to the Government, where the grade is high or of a superior class, would be vastly superior to the labor product at present. I am quite certain that the product that we have obtained at the Washington Navy-Yard is greater. We have cheapened the price of guns, working eight hours beyond that at which they can do it in private employ. I am ready to claim that the Government can make cheaper guns than the contractor can outside with ten hours."

The authorities of some few States and municipalities have enacted eight-hour laws, and to give the weight of the influence and example of the General Government to the legislative authorities of States and municipalities to make the application of such law universal, Congress adopted the principle in 1868 by an act approved June 25, 1868. It was enacted as follows:

"*Be it enacted, etc.*, That eight hours shall constitute a day's work for all laborers, workmen, or mechanics now employed or who may be hereafter employed by or on behalf of the Government of the United States, and that all acts and parts of acts inconsistent with this act be, and the same are hereby, repealed."

From the moment of the enactment of this law to the present there has been constant complaint that it was almost universally disregarded and evaded by the officers of the Government whose duty it was to observe and enforce it, and every succeeding Congress has been appealed to to so amend its provisions as to command and secure its observance.

There can be no question but that it was the intent of Congress, by the act of June 25, 1868, to limit the daily hours of service of the laborers and mechanics in the employ of the Government to eight hours in any one calendar day. If it is the present policy of the Government to adhere to and maintain that principle, then Congress should enact a measure that will command observance. If it is not the present policy of the Government to adhere to such principle, then Congress should immediately repeal the act of June, 1868. Its enactment, if it was not intended to be enforceable or be enforced, was but a mockery of the millions of citizens who desired an eight-hour law.

If it was intended to be enforceable and to be enforced its evasion by the officers of the Government and the failure of Congress to prevent such evasion by proper amendments are alike mockeries of the people. That the act was defective to enforce observance of its plain intent if the officers of the Government desired to evade it was determinable from its face, without any judicial interpretation. That it was thus defective was long since judicially determined. The Supreme Court in *United States* v. *Martin* (94 Otto, 400), in construing the act, says:

"The act of Congress of June 25, 1868 (15 Stat., 77), declaring that eight hours shall constitute a day's work for all laborers, workmen, and mechanics employed by or on behalf of the Government of the United States, is in the nature of a direction by the Government to its agents. It is not a contract between the Government and its laborers that eight hours shall constitute a day's work. It neither prevents the Government from making agreements with them by which their labor may be more or less than eight hours a day, nor does it prescribe the amount of compensation for that or any other number of hours of labor."

The testimony taken before this committee upon the investigation already referred to shows that the Department and bureau officials, acting upon such interpretation of the act—that is, that they were not prohibited from contracting with employees for the labor of such employees for more than eight hours in the day—made such agreements with most employees employed directly by the Government for service for a greater number of hours. It is also shown that much the greater part of the Government's work (upward of 75 per cent) is done under the contract system, and the officers of the Government held that they had no authority in the matter of regulating the hours of labor of the laborers and mechanics in the employ of contractors on Government work; that as to work done under contract the law did not apply; hence, by these two methods of evasion, the law has been practically annulled.

The measure herewith submitted, it is thought, will secure a practical enforcement of the purpose intended to be secured by the act of 1868. It limits the service and employment of all laborers

and mechanics employed by the Government of the United States, by the District of Columbia, or by any contractor or subcontractor of the United States or of the District of Columbia, upon any of the public works of the United States or of the District of Columbia, to eight hours in any one calendar day; makes it unlawful for any officer of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics, to require or permit such laborer or mechanic to work more than eight hours in any one calendar day, except in cases of extraordinary emergency; makes the willful violation of its provisions a misdemeanor, and imposes suitable penalties for such violation. This measure differs essentially in three particulars from the act of June 25, 1868: First, it extends in plain terms to laborers and mechanics in the employ of contractors and subcontractors on Government works.

It might be contended that such laborers and mechanics were included in the act of 1868 under the words "by or on behalf of the Government," etc. However that may be, it was thought best not to leave the terms or meaning of this measure ambiguous. It will be urged that the measure ought not to extend to laborers or mechanics in the employ of contractors and subcontractors with the Government, but should be limited to direct employments by the Government. When it is considered that the purpose of Federal legislation on this subject is to lend the influence and example of this Government to the authorities of States and municipalities, having a broader scope of

jurisdiction in which to make the principle applicable, and when it is further considered that all the work of the Government in the construction of public buildings and 75 per cent of all other work of the Government, including river and harbor work, is now done by contract, and that if it was the desire of officials to evade the law every work, no matter how small, might be let by contract the law would be a dead letter when enacted. If we wish by the example of this Government to make the application of the principle universal, we must ourselves extend it to the limit of the scope of our jurisdiction.

Second. It makes it unlawful to allow or permit a laborer or mechanic to work more than eight hours in any one calendar day, thus prohibiting evasion in the manner the act of 1868 was evaded, which the Supreme Court held might be done by special contract with each employee to work a greater number of hours than eight. If this be permitted, then the law is a dead letter when enacted, for these contracts can and will be made with every employee. It will be contended by those who oppose any and all legislation upon this subject that the Government has no authority to prohibit the citizen from making what contract he may please concerning his personal service; that such provision is an unwarranted infringement of the natural rights of the citizen. Whatever might be the force of such argument, if the law was intended to affect contracts for service between individual citizens and relating to private work, we do not think the position is at all tenable when urged against this measure.

The citizen has no natural right to demand any

work from the Government, and if he obtains such work he must obtain it upon such terms as the Government sees fit to impose. As to its own work the Government has a lawful right to say that laborers thereon shall be employed for only one hour in the day, as it may lawfully provide that such laborer shall work any given number of hours. It can not compel the citizen to enter its employ, but it may prescribe the terms upon which he shall enter, if at all. Nor in any view is such provision an unwarranted interference with the natural rights of the citizen. If the objection were tenable, then the whole fabric of legislation looking to the regulation of the hours of labor would fall to the ground.

Governments exist upon the surrender or curtailment of the natural rights, the natural liberties, of man. One citizen may desire to labor each of the seven days in the week; another may desire to employ his services for all of those days. It is the natural right of the one to thus work and of the other to employ; but the law steps in and prohibits such employment on one of these days and limits the right of the citizen to work to six days in the week, and this is justified on the ground that it is for the public good. If the Government may limit the days a man shall work during a week, where is the restriction on its right to limit the hours he shall work during a day, if such limitation be justified by the public good to result therefrom?

Third. It differs from the act of 1868 in this, that it imposes proper penalties for a willful violation, and thus provides measures to secure its enforcement.

Your committee therefore recommend that the said bills of the House (H. R. 257, H. R. 276, and H. R. 442) be laid upon the table and that the accompanying substitute therefor do pass.

(3)

The following letter, in response to an inquiry of the Attorney-General dated December 12, 1906, indicates the attitude of the War Department upon some of the questions discussed in the brief:

[Second indorsement.]

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, December 28, 1906.

1. Respectfully returned to the Secretary of War.

2. The dredging of rivers and harbors has always been regarded as a "public work" within the meaning of the acts of August 13, 1894, and February 24, 1905, and of paragraph 570, Army Regulations, and in each instance a bond is exacted, which provides that if the contractor "shall promptly make full payments to all persons supplying it (him or them) labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to retain in full force and virtue."

3. In requiring such a bond it has never been the purpose or intention of this office to attempt to discriminate as to which of the employees of dredging contractors were laborers or mechanics within the meaning of the eight-hour law, as prior to July 14, 1906, it had been held that officers who enter

into contracts on behalf of the United States are not charged with the duty of enforcing the law with reference to those with whom they contract, the latter being directly responsible in the matter. With regard to the crews of Government dredges, however, they were in general thought to be within the excepted class covered by the decision of Attorney-General Miller, dated August 27, 1892 (20 Opin. Atty. Gen., 459), upon which it is understood, paragraph 734, Army Regulations, is based.

4. When instructions were issued by the Secretary of War, on July 14, 1906, to the effect "that it is the duty of the officers of the War Department, in respect to Government contracts which are performed under their supervision and for the performance of which they are responsible, to use the powers they have to prevent violations of the law, and especially the Federal law, by contractors for the work which comes under their supervision," and calling for reports of all cases where laborers and mechanics employed by any contractor or subcontractor upon any public works of the United States had within the past two years been required to work more than eight hours a day, it was deemed advisable, since the correctness of the above-mentioned view of this office as to dredge employees was questioned, to regard dredging contracts as among the doubtful cases and to include all such in the reports of violations of the law, leaving it to the courts to decide the applicability of the law to them.

5. Since it would hardly be consistent for the Government to proceed against contractors for alleged violations of the eight-hour law without

applying the same interpretation of law to itself, attempts have since been made, pending decision by the courts upon some of the evidence presented, to reclassify the employees on floating plant of the engineer department with reference to said law. The authority for such action may be found in the opinion of the Attorney-General, dated May 22, 1905 (25 Opin. Atty. Gen., 465). In view of the somewhat meager legal decisions upon this point, this has been a difficult task. The only court decision known to this office which defines the status, under the law, of employees on floating plant is that rendered in case of *United States* v. *Jefferson* (60 Fed. Rep., 736). The court in its opinion emphasizes the dual nature of the services of crews of vessels while removing obstructions from navigable waters and imposes the duty of differentiating between their duties as seamen and as laborers. It has therefore been held that the labor of such employees as deck hands, foremen, machinists, blacksmiths, and ordinary laborers on board the dredges actually engaged on the public works of the United States, such as dredging operations, etc., and work incident thereto, should be restricted to eight hours per calendar day, except in extraordinary emergency, while to masters, pilots, mates, steam engineers, enginemen, stokers, stewards, cooks, cooks' helpers, waiters, and the like, whose work is not continuous, and who may be called upon at any or occasionally at all hours of the day to perform work to dredges while en route, and to the crews of tugs, steamers, survey and inspection boats, etc., who are strictly seamen, the law does not apply. It also seems reasonable to assume that in reckoning the eight-hour day for laborers

and mechanics not living on board dredges they should not, as a rule, be held to work or available for work for more than eight hours per day, but for those who live and are subsisted aboard the dredges only time in which they actually perform work should be considered.

6. The question of determining the status of the crews of self-propelling dredges is still more perplexing. These dredges are in reality seagoing vessels, having heavy suction pumps and bins for retaining dredged material, and when in operation they are slowly moving up and down the navigable channel, sucking into their bins the mud and later dumping it at the place of deposit. The question as to whether any of the employees of these self-propelling dredges can be regarded as other than seamen is in doubt.

7. The embarrassment which exists in the engineer department over the proper classification of employees on floating plant, under the eight-hour law, is clearly shown by the accompanying copy of letter of Maj. J. C. Sanford, Corps of Engineers, in charge of the Philadelphia district. It is hoped that much light will be shed upon the situation by one or more court decisions upon the cases of assumed violations of the law by dredging contractors which have been reported from time to time by this office, and to this end the recommendation contained in the communication of the Chief of Engineers to the Secretary of War, September 17, 1906 (E. D., 60017), is hereby renewed.

8. Copies of the forms of bond in use in the Engineer Department are inclosed herewith.

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

[Third indorsement.]

WAR DEPARTMENT,
January 2, 1907.

Respectfully returned to the honorable the Attorney-General, inviting attention to the foregoing report of the Chief of Engineers, U. S. Army, and to the accompanying inclosures referred to.

ROBERT SHAW OLIVER,
Assistant Secretary of War.

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(4)

RÉSUMÉ OF ORDERS, CIRCULARS, MEMORANDA, ETC., WITH REFERENCE TO THE EIGHT-HOUR LAW, ISSUED BY THE WAR DEPARTMENT.

August 1, 1892, General Orders, No. 7, for the information of the officers of the Corps of Engineers and agents employed under the Engineer Department, directed that the first two sections of the act should be incorporated into the terms of all proposals issued for public works and all contracts thereafter made.

October 15, 1892, by General Orders, No. 9, the prior order was revoked in view of the Department's interpretation of Attorney-General Miller's opinion (ante, p. 41).

Army Regulation 728, in the edition of 1895, and 734, in the edition of 1905, provides:

"Eight hours constitute a day's work for all mechanics and laborers employed by or on behalf of the United States, except in cases of emergency. This rule does not extend to engineers, firemen, seamen, watchmen, messengers, teamsters, and others the nature of whose employment is peculiar and whose services may be necessary at any or occasionally at all hours of the day."

A.

CIRCULAR, No. 33.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, July 30, 1906.

It has been decided by the Secretary of War "that it is the duty of the officers of the War Department, in respect to Government contracts which are performed under their supervision and for the performance of which they are responsible, to use the powers they have to prevent violations of the law, and especially the Federal law, by contractors for the work which comes under their supervision."

To permit compliance in accordance with instructions received in connection with the above decision, district officers will submit to this office at the earliest date practicable all cases in which, to the knowledge of such officer or his assistants, laborers and mechanics employed by any contractor or subcontractor upon any public works of the United States have, within the past two years, been required to work more than eight hours a day, and in any such cases under what emergency, if any, this work was performed. In making this report officers will furnish such available details as will permit a proper consideration of the case by the Department of Justice. *Attention is called to the fact that the emergency provision in the law is considered to cover any extraordinary emergencies which can not be foreseen, such as might be necessary for saving life or property of the United States, and not cases which depend for their emergency solely upon economical methods of work or importance of rapid construction.*

There will arise numerous cases in which doubt will be felt whether the work of a contractor or subcontractor has been or will be a work which is properly to be classed as coming under the restrictions as to work "of laborers and mechanics" upon any of the "public works" of the United States; but in all cases of doubt the facts will be as fully presented as information warrants, with a view to a decision being given by higher authority.

If the preparation of a full report upon this subject would result in material delay, officers will submit the cases from time to time as the facts are collected.

By command of Brig. Gen. Mackenzie:

FREDERIC V. ARBOT,
Major, Corps of Engineers.

B.

CIRCULAR, No. 38.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, August 11, 1906.

The Secretary of War directs that in all specifications hereafter the especial attention of the contractors must be called to the eight-hour act in order that they may be advised that, should they fail to comply, they will be reported by the officers of the War Department for such action as the Department of Justice may deem it proper to take.

To provide for compliance with such requirement, the following paragraph will be introduced in the specifications of all contracts for public

works carried on under the supervision of this Department involving the employment on such works of laborers and mechanics:

"The attention of bidders is called to the following act of Congress:"

(Here follows the act of 1892.)

"All bidders are advised that, should the contractors for the work fail to comply with this law, they will be reported by the officers of the War Department for such action as the Department of Justice may deem it proper to take."

In connection with the preceding, the following opinion of the Acting Attorney-General is published for the information and guidance of all concerned:

(Here follows an opinion (26 Opin., 36) not necessary to be included.)

By command of Brig. Gen. Mackenzie:

FREDERIC V. ABBOT,
Major, Corps of Engineers.

C.

CIRCULAR, No. 62.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, December 26, 1906.

The following extracts from correspondence touching upon the enforcement of the eight-hour law, more particularly as relates to the interpretation of the "extraordinary emergency" clause, is published for the information and guidance of the Corps of Engineers:

POINTE AU PIC,
PROVINCE OF QUEBEC, CANADA,
July 29, 1906.

Hon. ROBERT SHAW OLIVER,
Asst. Secy. of War, Washington, D. C.

MY DEAR GENERAL: I have your letter of July 24, 1906, referring to my instructions concerning certain alleged infractions of the eight-hour law and inclosing a memorandum from the Quartermaster-General regarding the violation of the law at * * *.

The action of * * *, constructing quartermaster at * * *, was in direct violation of law, for the reason that no case of extraordinary emergency is shown. An "extraordinary emergency" under the act is one not to be foreseen in time to avoid the necessity of exceeding the limit of the fixed daily hours of labor by the employment of more men or more shifts of men. Mere economical considerations do not affect the question at all. It is to be assumed that in making the requirement Congress knew that under many conditions the law would impose great expense upon the Government. What action shall be taken with respect to * * * violation of law I shall delay deciding until I see you and confer with the President.

The question whether inspectors of Government contract work done in a private factory like a shoe factory are within the law is one I should wish submitted to the Judge-Advocate-General and ultimately to the Attorney-General. My first impression would be that such inspectors were neither "laborers" nor "mechanics" within the law.

I am very clear also that the law only applies to laborers and mechanics directly engaged by the Government and to laborers and mechanics of contractors and subcontractors on contracts for the construction of works on public lands or easements, and not to contracts for construction of

articles to be furnished to the Government by delivery after completion. The latter are not public works within the statute.

The rulings of the Department will be in accord with the foregoing until further order. You can send a copy of this to the Commissioner of Labor as an informal memorandum. Meantime please ascertain all the details concerning the contract of employment of the inspectors and their duties and submit the matter, as above suggested, to the Judge-Advocate-General and the Attorney-General.

Very sincerely, yours,

WM. H. TAFT.

I return the * * * papers.

DEPARTMENT OF JUSTICE,
Washington, October 31, 1906.

To United States attorneys:

By order of the President, your attention is directed to the provisions of "An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," approved August 1, 1892 (27 Stat., 340), commonly known as the eight-hour law.

The Government is determined upon a strict enforcement of this statute, and you are directed diligently to investigate all complaints which may come to you from any source of violations of this law, and upon your own initiative to make investigation if there appears to you to be any reasonable ground for suspecting violation of this law. In every case in which you can secure sufficient evidence you will submit that evidence to the grand jury, with a view to securing an indictment.

Your attention is particularly directed to the exception in the first section of the statute, under which laborers and mechanics may be worked

more than eight hours in a calendar day "in case of extraordinary emergency." In a recent case in the district of Massachusetts Judge Dodge defined that phrase as follows: "An extraordinary emergency, such as is contemplated by the act, is the sudden, unexpected happening of something not of the usual, customary, or regular kind, demanding prompt action to avert imminent danger to life, limb, health, or property. The possibility of danger is not enough. The peril must be certain, unusual, imminent, and actual in order to constitute an extraordinary emergency such as the statute contemplates." Judge Dodge also ruled that probable pecuniary loss to the contractor, unless due to an extraordinary emergency, as defined above, is only an ordinary business risk.

I desire to impress upon you the importance of using every effort to execute these directions; of being vigilant and active in this matter. You will make prompt and full report to me of all cases and of your action thereon, with your reasons therefor. You will report immediately the action of the grand jury and the results of all trials, with a specific statement of the penalty imposed.

Respectfully,

WILLIAM H. MOODY,
Attorney-General.

[60017—C. of E.]

By command of Brig. Gen. Mackenzie:

FREDERIC V. ABBOT,
Lieut. Col., Corps of Engineers.

D.

WAR DEPARTMENT, *Washington.*

Memorandum for the Chief of Engineers.

I have received a call from the Commissioner of Labor and the heads of certain dredge workers'

unions in reference to the application of the eight-hour law to the dredging done directly by the Government and under the control and supervision of the engineering bureau of this Department. I am also informed that the Attorney-General has in effect taken the position, and that the attitude of the Government in court is, that the men engaged in dredging on the steam dredges are within the operation of the law and should not work for more than one shift of eight hours a day. I am also advised that this question is pending in the Supreme Court on appeal from the decision of a Massachusetts Federal court. Commissioner Neill thinks that it is an inconsistent position for the Government to occupy to have men, working under its control and direction, work under a theory of the law at variance with that which it has taken before the courts and which has been sustained by certain of the lower courts already. In this view I concur, and you are therefore directed to order all your subordinate officers having in charge men working upon dredges to work them but eight hours a day until the decision of the Supreme Court shall otherwise decide, if it does so decide. This, with such exceptions as you may establish to my satisfaction, are absolutely necessary to preserve the Government property as it is.

WM. H. TAFT,
Secretary of War.

MARCH 7, 1907.

E.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, March 15, 1907.

Memorandum for the Secretary of War.

1. Referring to the memorandum for the Chief of Engineers, dated March 7, 1907, giving instructions concerning the enforcement of the eight-hour law on Government dredges, attention is invited to the following considerations:

2. The memorandum is based upon the assumption that the attitude of the Government in court in the matter of contractors' dredges is that all the employees on such dredges are subject to the provisions of the eight-hour law, while the Government itself in its operation of dredges assumes a contrary policy, and that orders are necessary to correct such apparent inconsistency. It is presented, however, that, as understood by the Chief of Engineers, the Department of Justice has not taken the stand that all employees on contractors' dredges are subject to the eight-hour law, and, again, that all instructions heretofore given with respect to the dipper and clam-shell dredges of the Government, which dredges are similar to those in use by contractors, are to the effect that they should be operated under provisions of the eight-hour law, so far as the working of the dredges is concerned, excepting that a very few of the employees, such as master of dredge and probably cooks, firemen, and watchmen, may by the nature of their employment exceed the limits of an eight-hour day and the dredges can not be operated for eight

hours without such results; and the only question now presented is as to the applicability of the eight-hour law to the few exceptional employees above referred to.

3. The Government operates, however, a large number of another class of dredges, which are in fact ocean steamships, the employees of which are ordinarily of same class as are the employees on Government transports or other ships. No contractors own or operate any dredges of this class, and any consideration by the courts of the case of the ordinary contractor's dredge will probably have little bearing on the other class of employees. On such hydraulic dredges, however, all employees whose work is at all continuous are limited in their work to eight hours. Other employees, however, who are in effect sailors, may, as in the case of other Government ships, be on duty when not actively engaged in work in excess of eight hours. Such employees are, however, of the class which the opinion of the Attorney-General and the decision of the court have proven as exceptions to the eight-hour law. Many of such boats are kept at work the twenty-four hours of the day, and a change in the present system can only be effected, in most cases, by reducing the working time of the boats, it being impracticable to furnish accommodations for larger crews.

4. The act of August 1, 1892 (27 Stats. L., 340), commonly known as the eight-hour law, specifically applies to "laborers and mechanics" only, and from the date of its passage until the present time there have been a number of decisions by the legal officers of the Government and at least one court decision as to who constitute "laborers and me-

chanics" within the meaning of the law, thus clearly emphasizing the fact that the law is not universal in its application to all employees, but applies only to the classes specifically named.

5. One of the earliest opinions on this point is that of Attorney-General Miller, dated August 27, 1892, in which he says:

"Second. As to your second question, pertaining to particular employees, I beg to suggest that its answer depends upon matters of fact not stated and not within my cognizance. If the employees named are ordinary laborers or mechanics, working for the Government for wages under ordinary conditions, the statute would seem to apply. At the same time it is quite apparent that, as to some of them, it might frequently happen that they would be within the emergency exception named in the statute; and as to others, as, for instance, sailors or others on shipboard, or teamsters, their employment being peculiar, they might well be held to be, as a matter of fact, neither laborers nor mechanics within the meaning of this law."

And one of the latest is that of Attorney-General Moody, dated May 22, 1905, in which he uses the following language, particularly covering the point in question:

"On the other hand, the statute applies only to those persons who may *fairly come within the description of laborers and mechanics.* * * *

"It is believed that, giving to the words the meaning which is ordinarily accepted for them, and *having in mind that the act should not be extended beyond its plain terms*, the Commission will have no difficulty in determining in each case as it arises whether the employee is a laborer or mechanic or whether his duties are such as to warrant some other designation of his employment."

6. This distinction is also plainly recognized in paragraph 734, Army Regulations.

7. When the instructions of the Secretary of War of July 14, 1906, to report all cases in which contractors violated the law, were received it was recognized that there would be a number of doubtful cases, such as certain classes of dredge employees, and in order to be on the safe side orders were issued to district officers to report all cases in which such employees worked over eight hours, with a view to submitting such reports to the Department of Justice, in order that test suits might be brought in the courts and an authoritative decision rendered which would definitely and clearly fix the status of dredge employees in their relation to the eight-hour law.

8. It is understood that the only suit which has been formally instituted by that Department and decided is the Boston case, in which an employee of the contractor styled a "deck hand" was selected as a type of "laborer" and a steam engineer as a type of "mechanic," with a further statement of the nature of the duties of the other employees. The suit was a friendly one; no defense was made by the contractor, and it is understood that the primary object of the Department of Justice in instituting it was to get an authoritative decision in the matter and not for the purpose of securing punishment of the contractors for violation of the law, and that therefore such action can not properly be construed as committing the Department of Justice or the Government in general to the proposition that all employees on dredges are laborers or mechanics within the meaning of the law.

9. It is undoubtedly true that the question as to who among the men on dredges are laborers and mechanics and who are not is a difficult one to determine. But it is equally certain, in the opinion of this office, that not all of these men can be held to be laborers or mechanics within the meaning of the law. This opinion is sustained by the decision of the court in the case of the *United States* v. *Jefferson* (Fed. Rep., vol. 60, p. 736), in which the dual nature of the services of crews of vessels while removing obstructions from navigable waters was emphasized, and the duty imposed of differentiating between their duties as seamen and laborers, and also by the opinions of the Attorneys-General above referred to. Particulary is this true of the crews of self-propelling seagoing dredges, which are large seagoing vessels having heavy suction pumps and bins for retaining dredged material, and which when in operation are slowly moving up and down the navigable channel, pumping into their bins mud and sand and later dumping it at the place of deposit. The question as to whether any of the employees of these self-propelling dredges can be regarded as other than seamen is very doubtful.

10. The difficulty as to the proper classification of employees on dredging plant as regards the eight-hour law is clearly shown by the accompanying letter from Maj. J. C. Sanford, Corps of Engineers, in charge of the Philadelphia district.

11. Since the receipt of the order of July 14, 1906, above referred to, greater care has been exercised by this Department in the classification of its own employees on dredges, as will appear from the following extracts from the confidential circu-

lar issued by this office to district officers on September 24, 1906:

"While the recent instructions received and the resulting circulars and instructions relate especially to contract work, the matter of day's labor work should have the most careful consideration by officers in local charge of engineering districts, with a view of determining whether, as is assumed, the eight-hour law is being fully observed in connection with employees on such works. It must be remembered that the duty of officers to execute their work rapidly and economically is not in itself any justification for the slightest nonobservance of the law and would prove no defense in the eyes of superior authority or of the courts. Great care should be taken in exercising discretion as to what workmen are excepted from the classes of 'laborers and mechanics on public works' under opinion of the Attorney-General and paragraph 734, Army Regulations. From some reports received it appears possible that too liberal an interpretation is being given to the Attorney-General's opinion and that under the guise of such liberal interpretation the eight-hour law is being violated. * * *

"It is appreciated that all engineer officers and agents are actuated by a desire to carry on work assigned to them in an economical businesslike way and to secure at the earliest time practicable results commensurate with the money expended, and there will naturally be feelings of regret if any law apparently interferes with successful operations; but where there may be such apparent conflict between successful and economical operations and any law it must be remembered that while a businesslike execution of work is most desirable when practicable complete observance of law and regulations, both as to work and intent, is imperative."

12. It is the earnest desire of the Chief of Engineers and his subordinates to comply with the

eight-hour law, but there is also imposed upon them by Congress, in the expenditure of the large sums of money appropriated for river and harbor improvements, a considerable portion of which is devoted to dredging, the duty of securing the best results possible from the expenditures of these funds. Bearing in mind, then, these two points and what is understood to be the real attitude of the Department of Justice in the prosecution of the dredging cases referred to, the Chief of Engineers can not feel that there is any real inconsistency in the employment of, for more than eight hours per day, such of the employees on United States dredges as it is believed do not come within the provisions of the law. On the other hand, this appears to be his plain duty, taking into consideration the opinions of the legal officers of the Government on the classification of such employees, so far as known, and pending a definite decision by the United States Supreme Court.

Very respectfully,

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

F.

CIRCULAR, No. 12.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, March 18, 1907.

1. The following memorandum of the Secretary of War, dated March 16, 1907, and addressed to the Chief of Engineers, is published for the information and guidance of the Corps of Engineers:

My memorandum of date March 7, 1907, to you is changed to read as follows:

I have received a call from the Commissioner of Labor and the heads of certain dredge-workers' unions in reference to the application of the eight-hour law to the dredging done directly by the Government and under the control and supervision of the engineering bureau of this Department. I am also informed that the Attorney-General has in effect taken the position and that the attitude of the Government in court is that the men engaged in dredging on the steam dredges are within the operations of the law and should not work for more than one shift of eight hours a day. I am also advised that this question is pending in the Supreme Court on appeal from the decision of a Massachusetts Federal court. Commissioner Neill thinks that it is an inconsistent position for the Government to occupy to have men, working under its control and direction, work under a theory of the law at variance with that which it has taken before the courts and which has been sustained by certain of the lower courts already. In this view I concur, and you are therefore directed to order all your subordinate officers having in charge men working upon dredges to work all employees whose duties are in effect those of mechanics and laborers but eight hours a day until the decision of the Supreme Court shall otherwise decide, if it does so decide; this with such exceptions as you may establish to my satisfaction are absolutely necessary to preserve the Government property as it is.

WM. H. TAFT,
Secretary of War.

2. The above instructions should be strictly followed.

3. It is understood that a large number of the employees on dredges other than those of the self-propelling suction type, especially where the crews

do not live aboard, and some of the employees on the self-propelling dredges, particularly those whose labors are continuous, come within the provisions of the law and of these instructions. Therefore they should not be required to perform more than eight hours of effective labor per day. The actual dredging operations of dredges of the former class should be limited to eight hours per day for a single crew and to sixteen hours per day for a double crew.

4. In all cases in which district officers are in doubt as to the application of the law and of the above instructions, they should submit a full statement of all the facts and circumstances to this office for decision.

[60017—C. of E.]

By command of Brig. Gen. Mackenzie:

FREDERIC V. ABBOT,
Lieut. Col., Corps of Engineers.

G.

WAR DEPARTMENT,
Washington, March 23, 1907.

Memorandum for the Chief of Engineers, in response to his memorandum of March 15, 1907.

It is recognized that there may be employees of the Government on board seagoing dredges and other dredges who do not come within the eight-hour law. For the purpose of determining this matter, the Chief of Engineers is directed to formulate questions to be answered by the Attorney-General which will enable us to comply with the

law as it should be construed. The instructions issued by the Chief of Engineers on September 24, 1906, are fully approved, and the difficulty in the enforcement of the law is well understood, but there must be some classification and some rule adopted by which this very troublesome question shall be settled for the Department, and if questions can be formulated the answer to which will assist in this definition, it will greatly facilitate matters.

WM. H. TAFT,
Secretary of War.

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Supreme Court of the United States.

Nos. 567, 664, 665, 666, 667, 668, 669.—October Term, 1906.

567. William H. Ellis, Plaintiff in Error, *vs.* The United States.	In Error to the District Court of the United States for the District of Massachusetts.
664. Eastern Dredging Company, Plaintiff in Error, *vs.* The United States.	
665. Same *vs.* Same.	
666. Same *vs.* Same.	
667. Bay State Dredging Company, Plaintiff in Error, *vs.* The United States.	
668. Same *vs.* Same.	
669. Same *vs.* Same.	

[May 13, 1907.]

Mr. Justice Holmes delivered the opinion of the Court.

These are an indictment and informations under the Act of August 1, 1892, c. 352, 27 Stat. 340, "Relating to the Limitation of the Hours of Daily Service of Laborers and Mechanics Employed upon the Public Works of the United States and of the District of Columbia." They all bring up the question of the constitutionality of the Act, and they severally present some subordinate matters, which will be considered under the respective cases.

The Act limits the service and employment of all laborers and mechanics employed by the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or the District, to eight hours in any one calendar day, and makes it unlawful "to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency." By § 2 "any officer or agent of the Government

of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall upon conviction be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the Court having jurisdiction thereof." The plaintiffs in error were contractors within the scope of the Act, were found guilty and were fined. They all requested rulings that the Act was unconstitutional, excepted to the refusal so to rule, and on that ground brought their cases to this Court.

The contention that the Act is unconstitutional is not frivolous, since it may be argued that there are relevant distinctions between the power of the United States and that of a State. But the arguments naturally urged against such a statute apply equally for the most part to the two jurisdictions, and are answered, so far as a State is concerned, by *Atkin* v. *Kansas*, 191 U. S. 207. In that case a contractor for work upon a municipal boulevard was sentenced to a fine under a similar law of Kansas, and the statute was upheld. We see no reason to deny to the United States the power thus established for the States. Like the States, it may sanction the requirements made of contractors employed upon its public works by penalties in case those requirements are not fulfilled. It would be a strong thing to say that a legislature that had power to forbid or to authorize and enforce a contract had not also the power to make a breach of it criminal, but however that may be, Congress, as incident to its power to authorize and enforce contracts for public works, may require that they shall be carried out only in a way consistent with its views of public policy, and may punish a departure from that way. It is true that it has not the general power of legislation possessed by the legislatures of the States, and it may be true that the object of this law is of a kind not subject to its general control. But the power that it has over the mode in which contracts with the United States shall be performed cannot be limited by a speculation as to motives. If the motive be conceded, however, the fact that Congress has not general control over the conditions of labor does not make unconstitutional a law otherwise valid, because the purpose of the law is to secure to it certain advantages, so far as the law goes.

One other argument is put forward, but it hardly needs an answer. A ruling was asked in Ellis's case, and is attempted to be sustained, to the effect that the Government waived its sovereignty by making a contract, and that even if the Act of 1892 were read into the contract, a breach of its requirements would be only a breach of contract and could not be

made a crime. This is a mere confusion of ideas. The Government purely as contractor, in the absence of special laws, may stand like a private person, but by making a contract it does not give up its power to make a law, and it may make a law like the present for the reasons that we have stated. We are of opinion that the Act is not contrary to the Constitution of the United States.

We pass to the subordinate matters not common to all the cases. In Ellis's case the plaintiff in error agreed to construct and complete pier No. 2 at the Boston Navy Yard, within six months, according to certain specifications and at a certain price. He found more difficulty than he expected, although he expected some trouble, in getting certain oak and pine piles called for by the contract, and, having been delayed by that cause, he permitted his associate in the business to employ men for nine hours, in the hurry to get the work done. The judge instructed the jury that the evidence did not show an 'extraordinary emergency' within the meaning of Act. The judge was right in ruling upon the matter. Even if, as in other instances, a nice case might be left to the jury, what emergencies are within the statute is merely a constituent element of a question of law, since the determination of that element determines the extent of the statutory prohibition and is material only to that end.—The ruling was correct. It needs no argument to show that the disappointment of a contractor with regard to obtaining some of his materials, a matter which he knew involved some difficulty of which he took the risk, does not create such an emergency as is contemplated in the exception to the law. Again the construction of the pier was desirable for the more convenient repair of war ships, but it was not essential. Vessels had been docked without it since 1835 or 1836, so that there was no hot haste on that account, if under any circumstances that kind of need would have been enough.

There is only one other question raised in Ellis's case. It is admitted that he was a contractor within the meaning of the Act and that the workmen permitted to work more than eight hours a day were employed upon 'public works,' and it is not denied that these workmen were 'mechanics.' The jury were instructed, subject to exception, that if the defendant intended to permit the men to work over eight hours on the calendar day named he intended to violate the statute. The argument against the instruction is that the word 'intentionally' in the statute requires knowledge of the law, or at least that to be convicted Ellis must not have supposed, even mistakenly, that there was an emergency extraordinary enough to justify his conduct. The latter proposition is only the former a little disguised. Both are without foundation. If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally

breaks the law in the only sense in which the law ever considers intent. The judgment in this case must be affirmed.

The three cases against the Eastern Dredging Company were informations for employing certain men, alleged to be laborers or mechanics, more than eight hours a day upon what was alleged to be one of the public works of the United States, viz., dredging a portion of the thirty-five foot channel, so called, in Boston Harbor. The cases against the Bay State Dredging Company were similar, except that the place was Chelsea Creek in Boston Harbor. Of the former, No. 664 was in three counts for employing two deck hands and an assistant craneman and deck hand upon a dredge; No. 665 was for employing the master, craneman and fireman of the dredge; and No. 666 was for employing the captain, mate, engineer, and foreman of a tug that towed a scow, &c., and a man in charge of the scow. Of the Bay State Dredging Company cases, No. 667 was for employing the captain, mate and fireman of a dredge; No. 668 was for employing a craneman and deck hand on the dredge; and No. 669 was for employing a scow man and the captain and engineer of a tug. The offences were admitted or proved subject to the questions that already have been considered, and to the further questions whether the dredging was upon one of the public works of the United States and whether the persons employed were laborers or mechanics within the meaning of the Act, with one or two lesser points that will not need to be discussed.

Both of the phrases to be construed admit a broad enough interpretation to cover these cases, but the question is whether that interpretation is reasonable, and, in a penal statute, fair. Certainly they may be read in a narrower sense with at least equal ease. The statute says, "laborers and mechanics . . . employed . . . upon any of the public works." It does not say, and no one supposes it to mean, 'any public work.' The words 'upon' and 'any of the,' and the plural 'works' import that the objects of labor referred to have some kind of permanent existence and structural unity, and are severally capable of being regarded as complete wholes. The fact that the persons mentioned as employed upon them are laborers and mechanics, words admitted not to include seamen, points in the direction of structures and away from the sea. The very great difficulty, if not impossibility, of dredging in the ocean, if such a law is to govern it, is a reason for giving the defendants the benefit of a doubt; and the fact that until last year the Government worked dredging crews more than eight hours is a practical construction not without its weight. A change seems to have been made simply for the sake of consistency between the different departments of the Government, as is stated in an order of the Secretary of War. A different conclusion is sought to be drawn from some appropriation acts, but they simply refer to the improvement of harbors in general

terms among the public works for which appropriations are made. The improvement of a harbor may consist in the erection of structures as well as in the widening of a channel, or the explosion of a rock. It is unnecessary to lay special stress on the title to the soil in which the channels were dug, but it may be noticed that is was not in the United States. The language of the Acts is "public works of the United States." As the works are things upon which the labor is expended, the most natural meaning of 'of the United States' is belonging to the United States.

The words laborers and mechanics are admitted not to apply to seamen as that name commonly is used. Therefore it was contended but faintly that the masters of the tugs could not be employed more than eight hours. But the argument does not stop with masters of tugs, or even with mates, engineers and firemen of the same. *Wilson* v. *The Ohio*, Gilpin, 505. *Holt* v. *Cummings*, 102 Penn. St. 212. The scows and the floating dredges were vessels. Rev. St. §§ 3, 4612. They were within the admiralty jurisdiction of the United States. *The Robert W. Parsons*, 191 U. S. 17. (A number of cases as to dredges in the Circuit and District Courts are referred to in *Brown Hydraulic Dredging Co.* v. *Federal Contracting Co.*, 148 Fed. Rep. 290.) Therefore all of the hands mentioned in the informations were seamen within the definition in an earlier statute of the United States. Rev. Sts. § 4612. *Saylor* v. *Taylor*, 77 Fed. Rep. 476. s. c., 23 C. C. A. 343. See also Act of March 3, 1875, c. 156, § 3. 18 Stat. 485; *Bean* v. *Stupart*, 1 Dougl. 11; *Disbrow* v. *The Walsh Brothers*, 36 Fed. Rep. 607. They all require something of the training and are liable to be called upon for more or less of the services required of ordinary seamen. The reasons which exclude the latter from the statute apply, although perhaps in a less degree, to them. Whatever the nature of their work it is incident to their employment on the dredges and scows as in the case of an engineer or coal shoveller on board ship. Without further elaboration of details we are of opinion that the persons employed by the two defendant companies were not laborers or mechanics and were not employed upon any of the public works of the United States within the meaning of the Act. As in other cases where a broad distinction is admitted, it ultimately becomes necessary to draw a line, and the determination of the precise place of that line in nice cases always seems somewhat technical, but still the line must be drawn.

Judgment in 567 affirmed.

Judgments in 664, 665, 666, 667, 668 and 669 reversed.

Mr. Justice MOODY took no part in the decision of 567.

Mr. Justice MCKENNA is of opinion that the work upon the dredging of Chelsea Creek was within the Act. In other particulars he agrees with the judgment of the Court.